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In the Supreme Court of the United States

OCTOBER TERM, 1923

Nos. ~~170~~ & 171

CHAS. S. BOHLER, Tax Collector of Richmond County, Georgia;
C. A. STEED, Tax Receiver of Richmond County, Georgia;
J. T. PLUNKETT, Sheriff of Richmond County, Georgia;
STATE OF GEORGIA;
RICHMOND COUNTY; and
BOARD OF EDUCATION of Richmond County, Georgia;
Appellants,

vs.

E. H. CALLAWAY, As Executor of the Estate of J. B. White,
Appellee.

Appeal from United States District Court for the Southern District of Georgia, Northeastern Division.

IN EQUITY.

Motion to Dismiss or Affirm on Cross Appeal and Reverse on Main Appeal; or Transfer to the Summary Docket; or Advance said Cause for Hearing; and Brief Thereon Under Rule Six of the Supreme Court.

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In the Supreme Court of the United States

OCTOBER TERM, 1923

No. 551-552

CHAS. S. BOHLER, Tax Collector of Richmond County, Georgia; C. A. STEED, Tax Receiver of Richmond County, Georgia; J. T. PLUNKETT, Sheriff of Richmond County, Georgia; STATE OF GEORGIA; RICHMOND COUNTY; and BOARD OF EDUCATION of Richmond County, Georgia; Appellants, vs. E. H. CALLAWAY, As Executor of the Estate of J. B. White, Appellee.	Appeal from United States District Court for the Southern District of Georgia, Northeastern Division. IN EQUITY.

Motion to Dismiss or Affirm on Cross Appeal and Reverse on Main Appeal; or Transfer to the Summary Docket; or Advance said Cause for Hearing; and Brief Thereon Under Rule Six of the Supreme Court.

Now come the appellants through their solicitors of record and move the court to dismiss the cross appeal filed herein, or affirm the lower court theron, and reverse the decision of the lower court or the direct appeal; or in lieu thereof, transfer said cause to the summary docket; or in lieu of either of the foregoing motions to advance said cause for argument in this court, upon the following grounds:

As to said cross appeal, appellants say:

1. That it is manifest that the same was taken for delay only.

2. Because the questions presented thereby are so frivolous as not to need further argument.

3. Because the issues presented therein have been foreclosed by the decisious of this court, and the Supreme Court of Georgia.

As to the direct appeal, appellants say that said cause should be reversed for the following reasons:

1. Because it is manifest from the record that the errors complained of on said direct appeal are patent and need no extended argument.

2. Because it is manifest from the record, that the Legislature of Georgia by Act of 1918, Public Laws 232, prescribed an adequate remedy at law, whereby complainant's constitutional rights were preserved unimpaired, and complainant not having applied for relief thereunder, cannot claim that the State of Georgia or its officials have denied or deprived him of his constitutional rights under the Federal Constitution.

3. Because the evidence in the record from appellee fails to show any arbitrary, systematic, intentional discrimination against him under the rule of evidence as laid down by this court, whereby he is, or was denied any rights under the Fourteenth Amendment to the Constitution of the United States, and such decisions of this court have foreclosed this question against appellee, and the court below should have therefore refused the relief claimed.

As to the alternative motion to advance, appellants say:

1. An inspection of the record in said cause will show, that the efforts to collect the taxes claimed, have been delayed by litigation for a period of five

years, or thereabouts, and that the case before this court involves the State's rights to collect its revenues, and is of utmost importance to it; and for this reason a speedy determination should be had.

Appellants attach hereto as Exhibit "A" such portions of the record and issues involved, together with a brief of the law upon which they rely for the maintenance of this motion.

Therefore appellants pray:

(a) That said cross appeal be dismissed or the decision of the lower court on the questions presented thereby be affirmed.

(b) That the decision of the lower court be reversed upon the grounds set out in the direct appeal; or in lieu of the foregoing motion, that said cause be transferred to the summary docket; or that the same be advanced for argument in this court.

P. O. Address:
Atlanta, Ga.

Attorney General of Georgia.

Assistant Attorney General.

P. O. Address:
Augusta, Ga.

Solicitors of Record for Appellants.

EXHIBIT "A."
STATEMENT OF THE CASE.

The executor of J. B. White filed a bill in equity in the District Court of the United States for the Southern District of Georgia, to enjoin certain tax fi fas issued by the tax collector of Richmond County, Georgia, upon assessments made by the tax receiver thereof, for back taxes against the Estate of said J. B. White, for the years 1911-1917, both inclusive, upon some million and a quarter dollars or more worth of stocks and bonds in foreign corporations, which said White had refused to return for taxation as required by the laws of Georgia.

The facts leading up to the issuance of these executions as appear in the record, are in substance as follows: J. B. White was a domiciled resident of Richmond County, Georgia, from 1866 down until the date of his death in March, 1917. He died at Genoa, Italy, in March, 1917, leaving his last will and testament, in which he described himself as of Richmond County, Georgia, and in which he named as executor, E. H. Callaway, of Richmond County, Georgia, who in due course probated said will in Richmond County, as a domestic will, and letters testamentary were duly issued to him.

The said Callaway, as required by law, filed an inventory of said estate in the office of the Ordinary of RichmondCounty, in which he listed various and sundry stocks and bonds in foreign corporations, owned by said White, and kept on deposit by him with Henry Clews & Company, of New Yoork City, of the value of some million and a quarter dollars. The Richmond County authorities, learning of the large estate as left by said White, and that his returns of personal property for taxation for seven

years preceding his death, amounted to only $300.00 of household and kitchen furniture, (although he owned said securities, worth more than a mllion dollars), whereupon they instructed the Tax Receiver of Richmond County to proceed to notify said E. H. Callaway, as Executor of White, and demand that he make a return of said securities for taxation, for the years 1911-1917 inclusive. The tax receiver accordingly issued the statutory notice to said executor, demanding a return thereof, but instead of said executor making a return as demanded, he contended with the tax receiver as to the taxability of said property to such an extent that the tax receiver withdrew the first notice issued by him, dated June 4, 1918, and failed to assess such property. Thereafter, in December, 1918, Richmond County filed a petition for mandamus against the said tax receiver to compel him to proceed to assess said property from the best information he could obtain, alleging that, in withdrawing said notice, he, the said Tax Receiver was acting against the interest of the State and County, and in the interest of the Estate.

In response to the mandamus ni si, the Tax Receiver demurred and answered, setting up in his answer that he had no satisfactory evidence as to the ownership of said securities, and that it was his official duty as he conceived it, to act upon reasonably exact knowledge or information, and that he did not know whether said securities were taxable in Richmond County or not, and if taxable, whether White owned the same on any of the taxable dates for the years in question or the value thereof. Subsequently the State and County sought to make the executor of White, a party to said mandamus pro-

ceedings, to which proceedings the said E. H. Callaway, Executor, demurred upon the ground that he was neither a necessary or proper party defendant in said proceedings.

Thereafter, the Tax Receiver further amended his answer, in which he alleged that on June 10, 1919, he had issued a second notice to the executor, demanding a return of said property for said years, and that said executor had made a return thereunder, whereupon the State and County insisted that such return did not include the stocks and bonds in question.

On June 14, 1919, the case came on before the judge for a hearing upon the pleadings, and he orally announced that he would not make the mandamus absolute, but that he would retain jurisdiction of said case, in order to give counsel representing the taxing authorities, an opportunity of taking the deposition of one of the members of the firm of Henry Clews & Company, with whom said securities were alleged to have been deposited, in order for him to assertain whether said securities were owned by White **on the taxable dates** during said years **and the value thereof.** Subsequently the depositions of J. B. Clews were taken and he testified that said White had had upon deposit with said Henry Clews & Company upon the **taxable dates** for the years 1911 to 1917, inclusive, the lot of securities listed by Callaway, executor, in said inventory. These securities were then valued by certain expert loan clerks of the Bankers Trust Company of New York, who made oath to the values **thereof on the taxable dates as follows:**

February 1st, for 1911 - -	$1,012,366.67
January 31st for 1912 - -	1,397.671.67
January 1st, for 1913 - -	1,344,405.83

January 1st, for 1914 - - 1,556,915.83
January 1st, for 1915 - - $1,443,500.83
January 1st, for 1916 - - 1,508,436.00
January 1st, for 1917 - - 1,375,408.90

This evidence was then submitted to said Steed, and the same not being disputed, he therefore, on July 28, 1919, within twenty days from the issuance of said notice of July 10, 1919, rejected the return as made by Callaway, executor, and proceeded to assess said property according to such values, and gave said E. H. Calaway, notice thereof, as required by the Statute,

To the refusal of the judge to make the said Callaway a party to said mandamus proceeding, a bill of exceptions was sued out to the Supreme Court of Georgia, and that court by decision reported in 150 Ga., 235, held, that while said Callaway might have come voluntarily into said proceedings, he could not be forced in against his consent, and that the said receiver having assessed said property, the judge did not err in refusing to make the mandamus absolute, and thereupon affirmed the lower court.

Pending the mandamus proceedings, on August 7, 1919, said Callaway, Executor, claiming to act under Code Section 1116-d, (Act 1910), demanded an arbitration, touching the valuation placed upon said securities by the Tax Receiver, and named an arbitrator and thereupon the Tax Receiver, overlooking the Act of 1918, p. 232, named one. These arbitrators being unable to agree as to the value of said securities, or upon an umpire, the Tax Receiver and said executor joined in a request to the County Commissioners to select an umpire. On September 2, 1919, the arbitration proceedings were

scheduled to be held, and, prior to the holding thereof, the State filed a petition in equity to enjoin the same upon various and sundry grounds, to which petition the said Callaway appeared and orally resisted the issuance thereof, whereupon the judge refused a temporary injunction, and also refused a supersedeas and that judgment was carried to the supreme court and by decision rendered in 150 Ga., 235, the same was affirmed, in which decision the Act of 1918 was not referred to.

Thereafter, on the afternoon of September 2, 1919, said arbitrators met to pass upon the values of the property which had been assessed. At the meeting, Counsel representing the State stated that they waived no rights of the taxing authorities by appearing. Evidence was submitted, whereupon the arbitrators returned an award for an amount for about one-tenth of the admitted values of said securities. On the 6th of September, 1919, the State and Richmond County presented another petition in equity to set aside this award, alleging the same to be void upon various grounds, naming as defendants, said Callaway, as Executor, Steed, Tax Receiver, Bohler, Tax Collector, and the arbitrators. To this petition Callaway alone resisted, presenting a demurrer upon the ground, among others, that there was no legal or equitable cause of action set out, whereupon the court sustained said Callaway's demurrer and dismissed the State's petition

This ruling was carried to the supreme court and by decision handed down on March 4, 1922, the supreme court of Georgia held, that said assessments having been made subsequent to the passage of the Act of 1918, page 232, the arbitration proceedings referred to were totally void, and this being so,

the same did not stand in the way of the issuance of executions for taxes upon the assessments made by Steed, on July 28, 1919; that the taxing authorities had an ample and adequate remedy at law; that equity would not set aside an utterly void award; that said executor had his remedy thereunder, if he desired to question the assessments made by Steed, whereupon that court affirmed the judgment of the superior court, dismissing said petition upon demurrer.

The executor also alleged that the executions issued upon said assessments of Steed, Tax Receiver, of July 28, 1919, were illegal and void; that they cast a cloud upon title to real estate of tastator's estate; that the arbitration was valid and binding upon the State and other taxing authorities and res adjudicata of their rights; that prior to the passage of the Act of 1918, page 232, the laws of Georgia provided arbitration in tax matters of the kind in question; that if it should be contended that the Act of 1918 repudiated his right of arbitration, it was ineffective as a repealing statute and in violation of Article 3 Sec. 17 (Code 6445) of the Constitution of Georgia, which provides that no law, or Section of the Code, could be repealed by mere reference to the section or title; that the said Act of 1918 was retrospective and in violation of Article 1, Sec. 3, Par. 2 of the Constitution of Georgia; that should it be contended that the Act of 1918 repealed the arbitration provisions of Parks' Code 1116-d, and thereby denied him, and others in his class, the right of arbitration, it was directly and expressly discriminatory as it expressly reserved the right of arbitration to tax payers who were required to make returns to the Comptroller General and therefore in direct vio-

lation of Article 7, Sec. 2, Par. 1 of the Constitution of Georgia, requiring that all taxation shall be uniform upon the same class of subjects and advalorem on other property subject to be taxed, etc., and shall be levied and collected under general laws; that it was also in violation of Par. 2, Sec. 1, Art. 4 of the Constitution of Georgia, and the Fourteenth Amendment of the Constitution of the United States; that while said system of arbitration adopted by the Legislative Branch of the State Government as the uniform and universal method of finally fixing the values of property for taxation had not produced exact equality of burden in taxation and had resulted in the assessment of all property of the State at values greatly less than its full value, said system had been uniformly adhered to by the legislative branch of the State, and if said Act of 1918 as claimed, denied to Orator's testator, the statutory right of arbitration, while preserving it to all other taxpayers of the State; except those in your Orator's class, said act was discriminatory, illegal, contrary to law, and in violation of the uniformity tax provision of the Constitution of Georgia, and the equal protection clause of the Constitution of the United States. Upon **information and belief** it was charged that under the system of taxation and assessment of taxes in said State **as enforced** by the tax officers using and adopting said method for the years 1911-1918 inclusive, the assessment and valuation of all property in the State did not average twenty-five per cent. of the full value thereof, and stocks and bonds, money notes and accounts did not amount to ten per cent. of the true value thereof, whereas the award of said arbitrators fixed the value of said securities at twelve per cent. to twenty-five per cent.

of the full alleged value thereof; that the County Board of Tax Assessors for 1918 assessed said property for the year 1918 at $250,000 whereas the arbitrators for the year 1917 fixed the value at $360,-813.92 or forty-four per cent. greater than the said County Board of Assessors; that said award had been approved by the courts of the State and was final as to the amount of assessment for purpose of taxation, and, if the same is to be treated as a nullity under the Act of 1918 and plaintiff forced to go into a court of equity in the County of Richmond and there have the question of excessiveness determined, the same would be discriminative against him in that it would entail burdens, delays and expenses of litigation not placed upon the other taxpayers of said state, would be in violation of the uniformity tax provision, and the impartial protection provision of the Constitution of Georgia, and the due process clause of the Fourteenth Amendment to the Constitution of the United States; that said award was largely in excess of the assessments made and required of other taxpayers upon the same class of property; that comparitively few owners of stocks and bonds in foreign corporations either returned the same for taxation, or were required to return the same, and when returned they were returned at a nominal valuation resulting in assessments thereon throughout the State in a gross amount not exceeding five per cent. upon the full market value and, money notes and accounts, at not exceeding, ten per cent. of the full value thereof. Upon information and belief he alleged that for the years 1911-1917 local bonds were not returned; that during said years inventories of a large amount of estates appear upon the records of the Court of Ordinary which

show taxable securities amounting to more than a million dollars which had not been returned for taxation and that the tax receiver of Richmond County nor any agent or representative of the State had made any effort to have such property assessed or taxed for said years except in one small estate and a settlement was made therein at a nominal percentage of the full value; that the Tax Receiver claimed that neither he nor the County Board ever assessed property at its full value but tried to assess real property at 66 2-3%, and money, notes and securities, where returned, at 50% of its value; that therefore the act of said Tax Receiver in making the assessments of July 28, 1919, for said amounts, and the issuing of said tax executions was grossly discriminatory against said estate and was an administration of the law by said tax officials in a manner, and with results grossly discriminatory against said estate and in violation of the uniform provision of the tax clause, and the impartial protection clause of the Constiution of Georgia, and contrary to and in violation of the equal protection clause of the Fourteenth Amendment of the Constitution of the United States, etc.

There were certain allegations in the petition touching National Bank stock, which appeared on the list of property furnished the Executor by the Tax Receiver he had assessed, under the head of: "Stocks Not Taxed and Deducted" with a line drawn through the National Bank stock. It appears from the Record that this stock was not deducted however, but was included in the amounts for which executions were issued through an error in addition, etc.

The prayers waiving discovery, were:

(1) For temporary restraining order; (2) For a permanent injunction upon the final hearing; (3) That the executions set out be cancelled; (4) **That the assessment of taxes against said estate be by Decree of this Court, fixed finally and conclusively at the amounts respectively ascertained, named and determined in the award of said Board of Arbitrators, on September 2, 1919, and that "the payment** by your Orator of the full amount of all taxes due **on said assessments, including principal and interest, as calculated by said Tax Collector, to September 5, 1919, namely, the sum of $27,980.88, which said sum was tendered by your Orator to said Tax Collector on said date, shall be in full settlement and satisfaction** of all **State, County** and **School** taxes due by the estate of said J. B. White for said years; (5) That said defendant tax officials, their agents and attorneys be enjoined from instituting any other proceedings in connection with said taxes for said years; (6) That a rule ni si be issued etc.; (7) That plaintiff be granted such other relief as he may be entitled to; (8) Prayer for subpoena, etc.

Upon this petition being presented to Hon. Beverly D. Evans, Judge of the United States District Court for the Southern District of Georgia, he issued a rule ni si, and called to his aid, to pass upon the application for an interlocutory injunction, Judges Alexander C. Kind, Judge of the Circuit Court of Appeals of the Fifth Circuit, and Samuel H. Sibley, Judge of the District Court of the Northern District of Georgia; said rule ni si was duly served upon the Governor of Georgia, Hon. Thomas W. Hardwick and the Attorney General of Georgia, Hon. George M. Napier.

Respondents filed a motion to dismiss in the

nature of a demurrer. The salient parts of said motion to dismiss were in substance, as follows:

Because the averments thereof did not entitle plaintiff to the equitable relief sought; because he failed to allege that he was in possession of, or had title to any property which could be clouded by the tax fi fas; that it did not set out any property in his possession subject to said tax fi. fas. and he was not in position to raise the questions set up in his petition as he had no property interest to be protected; That neither the State nor any of its officials were seeking to deprive or deny plaintiff the equal protection of the laws, because it appeared that he had never appealed to the State laws for protection—had never sought to follow the remedy prescribed by the State to meet the conditions set out in his petition, to wit, the remedy prescribed by the Act of July 31, 1918, (Pub. Laws 1918, page 232) which provides the only remedy for defaulting tax payers whose unreturned property had been assessed for unpaid taxes, to dispute the taxability of the property taxed, or the value placed thereon, by petition in equity, addressed to the Superior Court of the County of the State where such property was assessed, and plaintiff nowhere shows that he had ever sought to avail himself of this remedy; That plaintiff was a defaulter or delinquent taxpayer, in laches, and did not come into court with clean hands, but set up claims of inequitable discrimination between himself and other taxpayers which should have been raised during the years 1911 to 1917 before they paid their taxes upon returns as made by them in 1911 to 1917; That no penalties were being enforced but the apparent effort of the State was to

collect the usual ad valorem taxes on the fair market value of the property assessed and it was no defense to plaintiff—a defaulter—that other taxpayers had not returned their property at its market value in 1911 to 1917, especially as it was not made to appear that the Tax Receiver of the State knew of such **non-return,** or that taxpayers were holding out and not returning property subject to taxation, nor did plaintiff show by his bill that his testator brought this condition, if it existed, to the attention of the Tax Receiver in 1911-1917, and that such official refused to assess such property at its true value, when by the law of Georgia, it was his privilege to so have informed the Tax Receiver; That the allegations did not show there was any unequal, arbitrary or systematic inequitable discrimnation being practiced against plaintiff; that plaintiff's testator, White, was the original defaulter in 1911-1917, and such was followed by plaintiff, his executor, when being summoned by the Tax Receiver to return the property in question for taxes in June, 1919, he refused to do so, property which should have been returned by White during the years 1911-1917, and thereby forced the Tax Receiver to assess said property under the Act of 1918 from the best information he could obtain, and that plaintiff had not contested nor denied such value, but claimed he should not pay taxes thereon because other taxpayers during said years had not returned their property or paid taxes thereon upon the market value thereof; that plaintiff could not in March, 1922, when other tax payers had been settled with for the years in question, raise and open questions of inequality of taxation with all other tax payers throughout the State **when the testator of plaintiff**

was the cause of the discrimination now complained of, by not having returned the property in question for taxation during those years and paid taxes thereon; That plaintiff, an executor of a defaulting tax payer presented no equitable reason to enjoin said tax executions under the Fourteenth Amendment of the Constitution of the United States, the State of Georgia and its political subdivisions from collecting its revenue when there was no dispute as to the value of the property assessed; That the court had no jurisdiction to review the award set up by plaintiff; and if it had, it was apparent that the same was void; because in July, 1919, there was no such proceedings allowed him, as there was no legal power in the Tax Receiver to enter into such arbitration after July 31, 1919, ect.; no legal power in the Board of Commissioners of Richmond County to appoint an umpire in such arbitration after July 31, 1918; that the State was not bound by any action of said Board of Arbitration or the Tax Receiver as the Act of 1918 repealed the right of arbitration so far as plaintiff was concerned, etc.

Respondents in their answer denied all the material allegations of complainant and set out in detail why the tax executions should not be enjoined.

The case came on for a final hearing, September 23, 1922, before Hon Wm. H. Barrett, United States Judge, successor to the Hon. Beverly D. Evans, deceased, whereupon both parties introduced evidence. A sumamry thereof is as follows:

COMPLAINANT'S EVIDENCE.

Complainant introduced in evidence the executions sought to be enjoined and the assessments issued thereon.

Also complete copies of the two State Court suits; the first brought to enjoin the holding of the arbitration, in which the Act of 1918 was not considered or referred to by the court; and the other brought to set aside the award returned by the arbitrators, the holding of which had been sought to be enjoined.

Attached to the last named record was set forth all the evidence submitted on the hearing of said arbitration and re-introduced on this hearing, to wit:

Exhibit "A", Oath of Arbitrators.

Exhibit "B-1", assessments.

Exhibit "B-2", Abstract of testimony of J. B. Clews as to the ownership and amount of securities of White, held by his firm.

Exhibit "C-1", Extract from Comptroller General's report showing amount of money, solvent debts, stocks and bonds which appeared to have been returned over the State for the years 1911-1917.

Exhibit "C-2", Affidavit of J. B. Clews as to amount of indebtedness due by J. B. White to his firm.

Exhibit "C-3", Affidavit of John W. Dickey, stating that in his opinion a large amount of stocks and bonds were owned by other citizens of certain Counties, which had not been returned, giving no names of the owners thereof or that the Tax Receiver of Richmond County had any notice of such ownership, etc.

Exhibit "C-5", Affidavit of Rufus H. Brown, simply giving amount of money on deposit in Banks of Augusta for 1916-1917-1918.

Exhibit "C-6", Affidavit of Callaway, stating result of his examination of Records in Clerk's Of-

fice where he found a number of uncancelled security deeds for 1909, 1910, 1911, 1912, 1913, 1914 and 1915; and joint affidavit of Bussey and Howard of like import. Neither affidavit gave the value of the property nor the owner thereof on any taxable date for any year, or that the Tax Receiver of Richmond County had any notice of the ownership of any of such property on any taxable date for any of the years 1911-1917.

Exhibit "C-7", Inventory of Estate of W. E. Benson, showing cash, $92,387.38, and an afidavit of Callaway, Executor, stating he had examined 66 estates in the Ordinary's Office for several years prior to the assessments against him, which showed $1,579,112 worth of stocks and bonds in foreign corporations and cash in Bank of $180,489. He did not state that any of the decedents owned any of the property as shown thereby on any of the taxable dates for 1911-1917, and Steed, Tax Receiver, knew of the same.

Exhibit "C-8", Testimony of Steed, Tax Receiver to the effect that he remembered the assessments against White Estate by Board of Equalizers for the year 1918 of $250,000; the Jack Estate of $150,0000, etc., that he had a rule not to assess for full market value; that in starting out he would assess at full market value, but if arbitration was demanded he would settle on some other basis of less value, etc. And on Cross Examination, he stated that if a person returned his property at being worth a million dollars he would assess the same at a million; that he only knew of the Estates mentioned to him by Callaway in a general way, etc.

The foregoing were exhibits to the last named State suit. Recd. 309-11, P____.

In addition thereto, he offered another affidavit of E. H. Callaway, Executor, dated April 20, 1922, giving list of stocks and bonds still held by him belonging to White's Estate; that while he had transferred all real estate and the securtities which had been assessed since their assessment, to the trustees under White's Will, he was still actively engaged otherwise in the administration of said Estate, and then went into a general regeme of the case practically as set out in his bill as to the steps leading up to the assessment of the property in question and the arbitration proceedings, etc. Attached to this affidavit was the affidavit of Dugal and McPherson, who had valued the property upon the taxable dates for the years 1911-1917 to-wit: Feb. 1, 1911, Jan. 31, 1912, Jan. 1, 1913, Jan. 1, 1914, Jan. 1, 1915, Jan. 1, 1916, and Jan. 1, 1917; and upon which Steed acted, setting out the values and a list of the securities and also the information as furnished him by Steed. This included, under the head of "Stocks Not Taxed and Deducted", the National Bank Stock which appeared to have been marked out, and stock in Southwestern Railroad not taxable, all of which however had been added in the general totals; also the award returned and his check tendered in payment of taxes figured thereon, etc. Recd. 311-321, P____.

Extracts from Comptroller General's reports reviewing the tax system of Georgia, and which included the amount of property which appeared to have been returned over the State for the years 1911-1917 inclusive; extracts from Report of H. J. Fulbright, State Tax Commissioner, for year 1920, (this year not in question), including a table of estimated value of lands in the several Counties of

the State and per cent. thereof, as appeared to have been returned for taxation as figured by him from the Digests sent in by the Tax Receivers. Recd. 322, P____.

Another affidavit of Callaway, Executor, dated September 18, 1922, as to an examination of inventories of twelve estates in the Ordinary's Office, and included in the sixty-six estates referred to in his previous affidavits, selected at random from the larger estates administered in Richmond County for the years 1915 and 1918; that such inventories showed more than 100 estates where decendants were residents of Richmond County at date of their death and owned either money, notes and credits, stocks and bonds, and in all of said instances the Tax Digest of the County for the years immediately preceeding their deaths, disclosed that they made practically no returns thereof; and where returned, was returned at only a nominal amount; that such inventories showed a fair average of all tax returns made upon said classes of property for all the decedants, inventories of whose estates appeared in Ordinary's Office from 1911-1917 inclusive; that notwithstanding the fact that this information was brought to the attention of Steed, Tax Receiver and attorneys, who brought the proceedings to collect the present taxes; **in deponents affidavit of August 23, 1919, used before the arbitrators, and again in his affidavit of April 22, 1922,** on the hearing **for interlocutory injunction,** no proceedings had been instituted to collect back taxes upon said estates, etc. Recd. 327-28, P____.

Also copies of said inventories were introduced

by complainant. Recd. 331-41, P____. (We call the Court's attention here to the fact that these affidavits did not state that any of the property was owned on **any taxable dates for** any of the years in question, and the only information with reference thereto was brought to light in this immediate litigation.)

An excerpt from a Report of John C. Hart, State Tax Commissioner for 1914, in which he stressed equalization as of first consideration; also an address by H. J. Fulbright, State Tax Commissioner for the year 1919 (this year not in question) setting out the aggregate of the assessed land in the State of $982,623,580 and according to his method of estimating the same, he stated therein the assessed value was about 32 6-10 of the actual value thereof, etc. Recd. 328-30, P____.

Also an affidavit of Jas. P. Verdery and Hal K. Lowery members of the Board of Equalizers of Richmond County in which they stated the manner in which their Board had reached the assessment placed on the property in question for the year 1918; (this year not in question), that they had been advised that **White was an alien and his executor might take the position that such property was not asessable in Richmond County at all,** and they sought legal advice, and upon being advised that the property was subject to taxation, and as to how to proceed, they then discussed the question with the Executor and made their assessment of $250,000; that from the best information they could obtain, that assessment was at a higher rate percentage of the value than the percentage of the returns of similar classes of property as made by the **Tax Payers** of Georgia for the years 1911-

1917, which fact they stated in their opinion was known to the executive and tax officials of the State, and members of the General Assembly, etc. Recd. 335, P____.

(The Board had no authority touching collection of back taxes, State vs. Callaway, 150 Ga. 235.)

An affidavit of H. R. DeJarnette, of Putnam County, who swore that he was a member of the Tax Commission appointed by the Governor of Georgia under Act of August 20, 1918; that during the sessions of such commission in 1918-1919 he made considerable investigation into the values of various classes of property in Georgia; that where possible to get statistics either from United States Government, Census Departments, or other sources, this was done and made available by the Commission; that it was imposible to obtain any definite or accurate information as to intangible property owned by the tax payers of Georgia as no such statistics were available, but from the amount of money on deposit in Banks of the State, after making reasonable deductions, and by adding what seemed to be, from inquiry, the relative ownership of solvent debts as compared with the ownership of actual money the conclusion was reached that the returns of money and solvent debts in the State did not represent more than 10 per cent, of its fair market value; that they were confronted with the lack of statistics from any source, showing the amounts of stocks and bonds owned by the Tax Payers of Georgia, but from inquiry from brokers and others, he was of the opinion that the aggregate amount of such property as shown by the Report of the Comptroller General did not represent more than 5% of the full value, etc. Recd. 336, P____.

(Commission created after assessments made in this case.)

Complainant then introduced in evidence 3 affidavits from Morgan County; 3 from Wilkes County; 3 from Floyd County; 3 from Habersham County; 3 from Coweta County; 3 from Chatham County; 3 from Putnam County; 3 from Troupe County; 3 from Columbia County; 4 from Burke County, and one from Richmond County, all of practically the same import In each of these affidavits the affiant swore as to his occupation, length of residence in the County, his familiarity with the values therein; and then each copied tables from the reports of the Comptroller General of the several kinds of property as appeared to have been returned for the several counties, and that in their opinion such tables did not represent more than 20 per cent. of the land values; 10 per cent. of money, notes and accounts, and 5 per cent. of the stocks and bonds which were owned by the residents of the said several counties, etc. Recd. 337-59, P____. (None of the affidavits gave the name of a single tax payer owning such property on any taxable date for any of the years, nor that the tax receivers knew who owned stocks and bonds and refused to assess them.)

The foregoing was in substance all the evidence introduced by complainant to substantiate the allegations of his bill of illegal unconstitutional discrimination.

RESPONDENT'S EVIDENCE.

Respondents also relied upon the assessments and executions that had been introduced by complainant.

The depositions of Clews as to the amount of stocks and bonds held by his firm for the account of

White, also the affidavit of Marion H. McPherson and Robert W. Dugal, expert loan Clerks of Bankers Trust Company of New York, giving values of said stocks and bonds on taxable dates for each year in question. Recd. 361-63, P____. This was the evidence furnished Steed, and the same not being disputed, he made the assessments in question according to such values.

Marcus S. Baker, Tax Receiver of Chatham County swore that he had always sought to assess property as required by law; that he had no knowledge of any such property, which had not been returned for taxes, nor the owners thereof; that only recently he had collected a large amount of taxes from estates of decedants who had failed to make a return during their lives; that he knew of no systematic uniform custom prevailing among the Tax Receivers of the State whereby property was assessed at any percentage of its value. Recd. 369, P____.

C. A. Steed, Tax Receiver to the effect that he had always sought to carry out the instructions of the Comptroller General with reference to assessing personal property such as stocks and bonds in foreign corporations; that he had no personal knowledge of any such personal property nor the owners thereof which had been withheld from taxation; nor had he any information of such during the years 1911-1917, that if such information had been furnished him he would have acted as in the present instant; that when property was returned at ten thousand dollars, he assessed the same at ten thousand dollars; that the only information he had touching the estates mentioned by Callaway, Execu-

tor of White, was contained in the affidavits made by Callaway; that he had no such information as would cause him to require a return of such property for taxation; that he did not know that any of said property was owned by any of said parties during any of said years; that he had no occasion to examine the Records of the Ordinary's Office, etc., that he had not acted toward the Estate of White in any different way than he would have acted toward any one else, under like circumstances. Recd. 364-5, P____.

M. C. B. Holley, Chairman Board of Commissioner of Roads and Revenues of Richmond County, Georgia, who swore that he had no information touching the estates mentioned by Callaway in his affidavits as to whether the same was owned by any of the parties on any of the taxable dates in any of the years in question; that if he did have he would direct that the same be assessed as was done in the White case. Recd. 366-7, P____.

Benj. E. Pierce, to the effect that he had been representing the Taxing authorities throughout the White case; that he had read the affidavit of E. H. Callaway, dated September 18, 1922, and denied as stated, therein, the charge of illegal, unconstitutional discrimination, etc. Recd. 367-8, P____.

An affidavit of **Wm. A. Wright,** who swore that he had been Comptroller General of the State for more than 30 years, and that he had always issued books of instructions in which he urged upon the Tax Receivers of the State their duties touching the assessment of stocks and bonds in foreign corporations at their fair market value; that he never countenanced any Tax Receiver allowing the tax payers to return property at any

percentage of its value; that so far as his office was concerned there had never been any concerted effort to tax property in any other manner than as provided by law, etc. Recd. 368, P____.

Book of instructions issued by the Comptroller General during each of the years 1911, 1914, 1915, 1916, 1917, 1918, 1921, each of which urged upon the Tax Receivers to exert their best efforts to compel a return of stocks and bonds in foreign corporations and to thereupon tax the same at its fair market value, etc. Recd. 368-370, P____.

H. J. Fulbright, State Tax Commissioner swore that he was familiar with the method of taxing property in Georgia; that there was no uniform, systematic, method existing among the tax officials of the State whereby property was assessed **at any per cent.** of its value but where it was returned as being worth ten thousand dollars, the same was assessed **at 100 per cent; that the rate of taxation throughout the State was uniform and applied to all property;** that there may have been a number of tax defaulters in the State—persons who did not make any returns of their property, or when making a return, did not disclose all of their property for taxation, **but none** of these **practices** were **inaugurated** by the taxing officials of the State; nor were **such practices encouraged by them;** that the tax officials **could not possibly know, even approximately, the number of shares of stocks and bonds concealed** and not returned and taxed; that he knew of no uniform, systematic, practice of the taxing officials of the State allowing stocks and bonds where they knew of their existence to escape taxation; that one of the troubles that deponent and all other tax officials of the State had to contend with was the failure of the

tax payers to disclose their intangible property; that when it was disclosed or came to light, the same was assessed in like manner as all other property; that there was **no uniform, systematic discrimination** practiced by the Tax Receivers of the State in taxing one kind of property at one rate and another kind at a different rate; that the Tax Receivers over the State could not know whether the tax payers were telling the truth when swearing to their tax returns; that instead of there being any uniform, systematic rule of discrimination practiced by the tax officials of the State, if such did exist, the same was due to the taxpayers themselves, and not to the tax laws, or the acts of the tax officials. Recd. 369-71, P____.

Also eighty-five affidavits from as many separate Tax Receivers of 85 counties from all over the State in substance as follows: That they had always sought to carry out the instructions of the Comptroller General touching the assessments of stocks and bonds in foreign corporations at their fair market value as far as it had been in their power to do so; that they had no knowledge of any such property, nor the owners thereof, which had been withheld from taxation by the owners thereof; that they knew of no uniform, systematic rule in force in the State whereby the Tax Receivers had uniformly assessed such property at any per centage of its value and to the best of their knowledge such a system did not exist. Recd. 371-3, P____.

During a recess of the trial of the case the Complainant paid to the Tax Collector, the amount of taxes calculated on the values as fixed by the arbitrators and thereupon attached a copy of the receipt given him by the Tax Collector to an amendment allowed September 25, 1922, (Record Page 271-276)

which receipt recited that it was received without prejudice to the rights of the taxing authorities in this litigation.

From a judgment dated June 25, 1923, enjoining the executions, the respondents in the lower court appealed direct to this court; and complainant, therein also filed a cross appeal.

POINTS INVOLVED AND OUTLINE OF ARGUMENT.

I.

The Court erred in overruling appellants motion to dismiss in the nature of a demurrer.

For the purpose of discussing this point, we shall do so under the following heads:

(a) The Act of 1918, page 232 of the General Assembly of Georgia prescribed an adequate remedy at law and complainant should have been remanded to the State Courts.

(b) Appellee had no title to real property which could be clouded by the tax executions; no multiplicity of suits was alleged, nor did he allege any facts which showed irreparable injury.

(c) Complainant failed to do that equity which would entitle him to be heard.

(d) The inclusion of the National Bank stock along with the million or more dollars worth of other taxable property did not authorize the court to retain jurisdiction of this cause.

II.

IN ADMISSIBILITY OF COMPLAINANT'S EVIDENCE.

Under this head we shall discuss the several assignments of error urged to the admissibility of the evidence offered by complainant.

III.

NO DISCRIMINATION.

Under this head we shall discuss the six general assignments of error.

IV.

CROSS APPEAL.

These are the three questions urged by appellee in his cross appeal:

1. Was the State Court's decision res adjudicata?

2. Was the Act of 1918, page 232, unconstitutional?

3. Did the Court err in allowing interest on the whole amount due as fixed by said award from the date of the rendition thereof?

LAW AND ARGUMENT.

I.

The court erred in overruling appellants motion to dismiss in the nature of a demurrer.

Because:

(a) The Act of 1918 of the General Assembly of Georgia prescribed an adequate remedy at law and complainant should have been remanded to the State Courts.

For the court's convenience we set forth.

GEORGIA'S SYSTEM OF TAXATION, CONSTITUTIONAL AND STATUTORY.

Constitution.

Section 6462 of the Code provides that,

"The right of taxation is a sovereign right,.... inalienable, indestructible, is the life of the State, and rightfully belongs to the people in all republican governments, and neither the General Assembly, nor any nor all other depart-

ments of the government established by this Constitution, shall ever have the authority to irrevocably give, grant, limit, or restrain this right; and all laws, grants, contracts, and all other acts whatsoever, by said government or any department thereof, to effect any of these purposes, shall be and are hereby declared to be null and void for every purpose whatsoever; and said right of taxation shall always be under the complete control of, and revocable by, the State, notwithstanding any gift, grant, or contract, whatsoever by the General Assembly."

Section 6553 declares:

"All taxes shall be uniform upon the same class of subjects, and ad valorem on all property subject to be taxed within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws. etc."

Section 6554 that:

"The General Assembly may, by law, exempt from taxation all public property; places of religious worship or burial; all institutions of purely public charity; all buildings erected for and used as a college, incorporated academy, or other seminary of learning, the real and personal estate of any public library, and that of any other literary association, used by or connected with such library; all books and philosophical apparatus; and all paintings and statuary of any company or association, kept in a public hall, and not held as merchandise or for purposes of sale or gain; Provided, the property so exempted be not used for purposes of private or corporate profit or income. (The General Assembly shall further, have power to exempt from taxation, farm products, including baled cotton, grown in this State and remaining in the hands of the producer. but not longer than for the year next after their production.")

Section 6556 declares, that,

"All laws exempting property from taxation other than the property herein enumerated, shall be void."

STATUTORY PROVISIONS.

Section 1000 of the Code declares, that,

"No county authorities shall exempt from taxation, any manufactury, industry, enterprise or any property of any kind, not now exempt by law."

Section 1001, that ,

"The tax receiver shall have all property, whether exempted by the county authorities or not, which is required by law to be returned for taxes in the several counties in this State, returned for taxation, and the tax-collector shall collect the taxes upon such property."

Section 1002, is as follows:

"All real and personal estate, whether owned by individuals or corporations, resident or non-resident, is liable to taxation."

Section 1002 (a), provides,

"Personal property shall be construed, for the purposes of taxation, to include all goods, chattels, moneys, credits, and effects, whatsoever they may be, all ships, boats and vessels belonging to the inhabitants of this State, whether at home or abroad, and all capital invested therein; all money within or without the State due the person to be taxed; all stocks and securities in corporations in other States owned by citizens of this State unless exempt by the laws of the United States or of this State."

Section 1003, is as follows:

"In returning property for taxes, all property shall be returned at its value, promissory

notes, accounts, judgments, mortgages. liens of all kinds, and all choses in action shall be given in at their value whether solvent or partially solvent."

Section 1004, defines "fair market value" as follows:

"The intent and purpose of the tax laws of this State is to have all property and subject of taxation assessed at the value which would be realized therefrom by cash sale, as such property and subjects are usually sold, but not by forced sale thereof, and the words 'fair market value,' when used in the tax laws, shall be held and deemed to mean what the property and subjects would bring at cash sale when sold in such manner as such property and subjects are usually sold."

Section 1010, declares that,

"All property or other thing of value, subject to taxation, must be given in by the tax payers as hereinafter set forth, at its fair market value, and must be taxed according to its value on an assessment to be made by the Governor, with the assistance of the comptroller general."

Section 1016 of the Code prescribes that,

"Bonds, notes, or other obligations for money, on persons in other States, or of other States, or bonds of corporations of other States, and shipping, are the subjects of return and taxation in this State."

Act of 1918 Under Which the Assessments Were Made.

"TAX COLLECTIONS FROM DELINQUENTS.

An Act to provide for the collection of taxes due to the State, counties and municipalities and schools thereof, and for other purposes.

Section 1. Be it enacted by the General Assembly of the State of Georgia, and it is hereby enacted

by authority of the same, That when the owner of property has omitted to return the same for taxation at the time and for the years the return should have been made, or having returned his property or part of same, has grossly undervalued the property returned, or his property has been assessed for taxation at a figure grossly below its true value, such owner, or, if dead, his personal representative or representatives, is required to return such property for taxation for each year he is delinquent, whether delinquency results from failure to return or from gross undervaluation, either by the delinquent or by assessors, said return to be made under the same laws, rules and regulations as existed during the year of said default, or said property was returned or assessed for taxation at figures grossly below its true value. Provided, that no lien for such taxes shall be enforced against any specific property which has been previously alienated or encumbered, and it is in the hands of innocent holders without notice.

Sec. 2. Be it further enacted, That when the owner of said property, or, if dead, his personal representative or representatives, refuses or fails to make returns in cases of property which should have been returned to the Comptroller-General, the said Comptroller-General shall notify, in writing, such owner or his personal representative or representatives of his delinquency, demanding that a return shall be made thereof within twenty days.

Sec. 3. Be it further enacted, That when such property is of that class which should be returned to the tax receiver of the county, the said tax receiver shall notify in writing such delinquent, or, if dead, his personal representative or representatives,

of such delinquency, requiring that a return shall be made thereof within twenty days.

Sec. 4. Be it further enacted, That if the delinquent or his personal representative or representatives, as provided for in Section 2 of this Act, refuses or fails to return such property after the notice given, or returns it below what the Comptroller-General deems its value, it shall then be the duty of the Comptroller-General to assess such property for taxation for State, county, or municipal and school purposes, from the best information he can obtain as to its value, for each year in default, and notify such delinquent or his personal representative or representatives of the valuation, which valuation shall be final, unless the person or persons so notified raise the question that it is excessive, in which event the further procedure shall be as provided by Section 1045 of the Code of 1910.

Sec. 5. Be it further enacted, That if the delinquent or his personal representative or representatives, as provided under Section 3 of this Act, refuses or fails to return such property after notice given him, it shall be the duty of the tax receiver to assess such property for taxation from the best information he can obtain as to its value for the years in default, and notify such delinquent of the valuation, which shall be final, unless the person or persons so notified raise the question that it is excessive, in which event the further procedure shall be by petition in equity in the Superior Court of the County where such property is assessed.

Sec. 6. Be it further enacted, That if the delinquent under Section 2, disputes the taxability of such property, he may raise the question by petition in equity in the Superior Court of Fulton County,

and if such delinquent be dead, his personal representative or representatives shall have the same right.

Sec. 7. Be it further enacted, That if the delinquent or his personal representative or representatives, under Section 3, disputes the taxability of such property, he may raise that question by petition in equity in the Superior Court of the county where said property is assessed.

Sec. 8. Be it further enacted, That all laws and parts of laws in conflict with this Act be and the same are hereby repealed.

Approved July 31, 1918."

This Act is identical with old law except last 3 lines of Section 5, as follows; "in which event the further procedure shall be by petition in equity in the superior court of the county where such property is assessed."

We assert that the foregoing Act provides a full and complete remedy whereby complainant could protect his every right. If so, he cannot refuse to claim protection thereunder and flee to a Federal Court of Equity under a pretended claim of being denied the equal protection of the laws; or that he is being deprived of any other rights guaranteed him under the Constitution of the United States. For as was said by Mr. Justice Field in the case of Mobile Company vs. Kimball, 102 U. S., 691, 26 L. E., 238, "This court is not the harbor in which the people of a city or county can find a refuge from ill advised, unequal, and oppressive legislation." This language was quoted with approval by Mr. Chief Justice Fuller in the case of Walston vs. Nevin, 128 U. S., 578, 32 L. E., at page 544. We maintain however that the Act in question is a most liberal

one.

The Supreme Court of Georgia so held in the following language in the case of State et al vs. Callawy, March 4, 1922.

> "If the executor of the delinquent taxpayer is dissatisfied with these assessments, on the ground that they are excessive, he has his remedy under this act."

And this ruling was made in the face of the fact that the plaintiff herein insisted before the Supreme Court of Georgia that the Act of 1918 was unconstitutional. But notwithstanding this contention the Supreme Court used the language above quoted, showing clearly that it did not consider the act inoperative for any reason; in other words it dealt with the act as entirely constitutional and operative.

As was said in Michigan R. R. Cases, 201 U. S., 245, 50 L. E., 744, on page 761:

> "While this case did not directly determine the constitutionality of the statute, a fair implication is that it was not regarded as obviously in conflict with the State constitution, for in that event the court would scarcely have taken time to consider the validity of proceeding under its authority."

In the case sub judice the court would not have held the award void under the Act of 1918, and said that he, the taxpayer had his remedy thereunder, if for any reason the Act of 1918 was inoperative.

Under the ruling supra even though the Act of 1918 had conferred upon the Superior Courts of the State a legislative function, which is denied, if the State Courts considered such an act valid under the State laws, this would not violate any provision of the Federal Constitution. As witness this language:

"There might be a question whether, even if

there were a clear delegation of legislative functions to other departments of the State Government, it would be void under the Federal Constitution. Whatever, in view of the distinct grant in the Federal Constitution to the President, Congress, and the Judiciary of separately the executive, legislative, and judicial powers of the nation, may be the powers of congress in delegating legislative functions, a very different question is presented when the restrictions of the Federal Constitution to restrain like action in a State."

Michigan R. R. Co. supra, page 762 L. E.

In 37 Cyc. 1134 (b) it is said:

"In some States the laws provide a remedy against excessive or erroneous assessments by a suit or petition in a court of **general** jurisdiction, in the nature of a **bill in equity.**"

One of the authorities cited in support of the text is the case of United States Envelope Co. vs. Town of Vernon, 44 Atl., at 478 (Connecticut Case). In that case the petition set out the nature of the relief sought, one of its grounds being to have the "court to reduce the said valuation to the proper valuation and for such action and further relief as the appellant may be found by the Court to be entitled to." The Connecticut law under which such a proceeding was brought was section 3860 of the General Statutes of Connecticut which read as follows:

"Any person claiming to be aggrieved by the action of the board of relief in any town, may, within two months from the time of such action, make application, in the nature of an appear therefrom, to the Superior Court of the County in which such town is situated, which shall be accompanied by a citation to said town to appear before said court, which shall be signed by the same authority, returnable at the same time and served and returned in the same

manner as is required in case of a summons in a civil action."

The head note of this decision reads as follows:

"Under Gen. St. Par. 3860 providing that one aggrieved by action of the board of relief in a town may, within two months thereof, make application to the superior court, accompanied by a citation to the town to appear before it, which shall be signed by the same authority returnable at the same time, and served and returned in the manner, as is required in case of a summons in a civil action though the appeal may be by an application or petition, stating the facts and praying for appropriate relief, addressed to the superior court, after the manner of a petition **in equity under the old practice,** and accompanied by a citation in the ordinary form, it is, at most, a circumstantial defect, not rendering the process abatable, that the proceeding is by summons and complaint, in the ordinary form of a civil action, the complaint, describing the action of the board of assessors and that of the board of relief on appeal thereto, alleging that, within two months thereof, plaintiff has brought its appeal to the superior court, and praying for reduction in the valuation of property from that made by said boards and for such further relief as appellant may be found entitled to."

In the late case of Keokuk & Hamilton Bridge Co. vs. Fred Salm, 258 U. S., 122, 66 L. E., 496, the second head note is as follows:

"2. No case for equitable relief is presented by a bill which seeks to enjoin the collection of a tax challenged under U. S. Const. 14th Amend., as based upon discriminating overvaluation, where the state law affords ample opportunity to question the amount and the validity of the assessment, both before administrative tribunals and in the State courts."

The foregoing case is one of the latest expressions upon the subject and is most comprehensive.

It was said in the case of Union Pacific R. Co. vs. Board of Commissioners, 217 Fed., 540, in discussing whether or not fraud touching an assessment would give a Federal Court equitable jurisdiction without more. "Counsel also urge that the **taxing officers** were guilty of **fraud** in the assessment of plaintiff's property and that fraud is a ground for equitable jurisdiction. But it is by no means true that wherever fraud exists equity may be resorted to for redress. That is not the case when a legal remedy has been substituted by statute for the remedy in equity. We are not concerned with the cause of the invalidity of the tax. It may be due to illegality, unconstitutionality or fraud. Whatever the cause, it can do no more than make the tax invalid and that alone is not a ground for equitable jurisdiction."

Clearly the remedy provided by Georgia for a tax payer's protection is statutory and the fact that the statute has remitted its tax payers to the superior courts of the State, which is a court of law and exercises, both equitable and common law jurisdiction cannot be said to be any the less a legal remedy. Not upon the theory that the legislature of a State can deprive a Federal Court of equity of any of its jurisdiction but, as said in the case of Singer Sewing Machine Co., 229 U. S., 481, because of the "reluctance to interfere with the fiscal operations of the State Governments . . . where the Federal right of the persons could **otherwise** be **preserved unimpaired.**" It will be noted that the word "otherwise" does not mean whether in a court of law, or a court of equity in the State courts.

Again if the legislature of a State in determining what tribunal of the State should be clothed with the power to pass upon the excessiveness or invalidity of a tax assessment, chooses to remit the tax payer to either of its courts, the Federal Courts have studiously refused to interfere where the party had proper notice and an opportunity to be heard, where he could raise all questions and finally have the same adjudicated by the highest courts of the land.

What more considerate course could have been pursued than was pursued by the Act of 1918. This court will take judicial cognizance of the fact that all questions of fact in the Superior Court of Georgia, whether of equity or common law, are tried by a jury. So if this plaintiff had resorted to the superior court he would there have had the value of his property passed upon by a jury composed of Georgia tax payers—and also the question of discrimination and equalization likewise.

Shelton vs. Platt, 139, U. S., 591, 35 L. E., 273.

In the case of Altschul vs. Gittings, 86 Fed., 200, it was held that:

> 'Where the laws of a state create tribunals for the correction and equalization of assessments, and confer upon such tribunal power to grant relief to agrieved persons, it is for the supreme court of the State to determine whether the statutory remedy is exclusive, or whether it is only cumulative, and its action in that respect raises no federal question."

Citing the case of Railroad Co. vs. Patterson, 154 U. S., 130, 38 L. E., 934.

In the case of Standard Oil Co. vs. McGee, 191 Ill., 844, 60 N. E., 802, it was held that,

> "A bill in equity will not lie to enjoin collection of a tax under an alleged fraudulent assess-

ment where complainant did not resort to mandamus on refusal of Board of Review to grant him a hearing."

Under such rulings as above, certainly, in view of the Statutes of Georgia, it does seem that complainant should not be allowed to ignore such remedies and come into a Federal Court of Equity to enjoin the collection of State revenues. It is submitted, that such right of equalization of a defaulter, is in the Superior Court of Richmond County, under the Act of 1918, page 232, and not in a Federal Court of Equity, which could as readily enjoin any excess as could a Federal Court of Equity.

The authorities cited, clearly show that the State has a perfect right to remit one class to one remedy, and the other class to a different remedy, and no Federal Constitutional provision is thus violated. It is therefore submitted that the plaintiff cannot refuse to apply for redress under these provisions of the Georgia law and claim a right to come into a Federal Court of equity to enjoin State taxes.

GEORGIA HAS CLASSIFIED TAX PAYERS REMEDY.

Georgia by the Act of 1913, page 123, created a Board of Equalizers for each County to whom all assessments, made for any "current year" by the Tax Receiver are referrred, and under this Act such Board equalizes all property in the county for such "current year" only, as it has no power to equalize for any previous years. State vs. Callaway, 150 Ga., 235. Therefore under this act all persons who make a return come under the provisions thereof, and thus are given a right of equalization of their taxes, and if dissatisfied with such Boards' value, they can then have submitted, to a Board of Arbitration, the question of such value.

Then with reference to that class of property owners who do not return their property for taxation, she has enacted the Act of 1918, page 232. Under this act if any question is raised as to excessiveness, or that for any reason the tax is illegal, whether because of fraud, or of unconstitutional illegal discrimination, such questions must be raised in the Superior Court of the County in the State of Georgia where the tax assessment was made.

And the Supreme Court of the United States has held that such classification is perfectly legal and proper. For instance in the case of Watson vs. State Comptroller, 254 U. S., 122, 65 L. E., 170, it was said:

> "It is insisted that the tax is discriminatory because under it other property of the same kind, bequeathed to persons standing in the same relationship to the decendent. will not be taxed. But the power to classify for purposes of taxation is fully established. . . . And what classification could be more reasonable than to distinguish, in imposing an inheritance or transfer tax, between property which had, during the decedent's life, borne its fair share of the tax burden, and that which had not?"

Again in the case of Crescent Cotton Oil Co. vs. State of Missouri, 257 U. S., 129, 66 L. E., 166, in speaking of the right of a State to classify between individual and corporations, touching their right to operate in a State, the court said, that under the police power it was,

> "Settled that any classification adopted by a State in the exercise of this power which has a reasonable basis, and is therefore not arbitrary, will be sustained against an attack based upon the equal protection clause of the fourteenth amendment."

Clearly, touching its revenue laws, the State has the equal right to provide one remedy for its honest tax payers, and another for its dishonest ones, such as defaulters.

One of the cases cited in the case supra, is the case of American Sugar Refining Co. vs. State of Louisiana, 179 U. S., 89, 45 L. E., 102, which was a case construing a statute of Louisiana that imposed a certain license tax upon "each business of refining sugar and molasses . . . the license shall be based on the gross annual receipts of each person . . . engaged in said business. Provided, that this section shall not apply to planters and farmers grinding and refining their own sugar and molasses, etc., And the Court on page 103, L. E., said:

> "The act in question does undoubtedly discriminate in favor of a certain class of refiners, but this discrimination, if founded upon a reasonable distinction in principal, is valid."

And again on page 105 L. E., it was said:

> "The constitution of Louisiana classifies the refiners of sugar for the purpose of taxation into those who refine the products of their own plantations, and those who engage in a general refining business. . . . To **entitle a party to exemption** it must appear (1) that he is a farmer or a planter, (2) that he grinds the cane that he refines his own sugar and molasses, as well as refines the sugar and molasses, (3) meaning thereby the product of his own plantation."

The plaintiff therein, not coming within the exemption, was held subject to such tax and that such classification was valid.

While there has been no classification of property for taxation, but all property, both real and

personal, is taxed upon an ad valorem (Texas Company vs. Brown, 252 U. S., 466, 66 L. E., 721) she has classified her laws with reference to honest tax payers and defaulters, and has provided the "tribunal" to which each class must appeal when dissatisfied with the valuation placed upon his property.

Those making a return for taxation come under the Act of 1913, and those who default come under the Act of 1918.

In the case of Altschul vs. Gittings, 86 Fed., 200, it was held that:

> "Where the laws of a state create tribunals for the correction and equalization of assessments, and confer upon such tribunal power to grant relief to aggrieved persons, it is for the supreme court of the state to determine whether the statutory remedy is exclusive, or whether it is only cumulative, and its action in that respect raises no federal question."

The case of Wadley So. Ry. Co. vs. Georgia, 235 U. S., 651, 59 L. E., 405, was where the Georgia R. R. Commission issued an order prohibiting a railroad from demanding freight in advance and under the Georgia laws a violation of such an order subjected the offending road to a penalty of $1,000.00 to $5,000.00 a day for its violation, but under the laws of Georgia such an order was open to review in the Courts of Georgia. The railroad failed to seek to have such order annulled under the Georgia law, and when a suit was brought to recover such a penalty sought to defend against the same by claiming that said order was invalid and in controvention of the 14th Amendment of the Constitution of the United States. In passing upon this contention, Mr. Justice Lamar in his opinion said in the last paragraph thereof:

"But, where, as here, after reasonable notice of the making of the order, the carrier failed to resort to the safe, adequate, and available remedy by which it could test in the courts its validity, and preferred to make its defense by attacking the validity of the order when sued for the penalty, it is subject to the penalty when that defense, as here, proved to be unsucessful."

And in speaking of the right of the railroad to question the order in the Courts of Georgia, in the same decision (top page 414) it was said:

"From an examination of that section of the Code it is quite clear that it recognizes the right to a judicial review of administrative orders. Until it has been given a **contrary** construction by the **state court,** it must be **here construed** in **such a way as to leave it valid, and as conferring that sort of right** which furnishes the **adequate** and **available remedy which meets the requireqment of the Constitution. Any other construction would . . impute to the legislature an intent to deny the equal protection of the law."**

In the case subjudice the same would be true.

(b) Appellee had no title to real property which could be clouded by the tax executions; no multiplicity of suits was alleged, nor did he allege any facts which showed irreparable loss.

The allegations in the bill do not show that he is in possession of, nor that he has title to any property upon which any cloud can be cast by the tax fi. fas. sought to be enjoined. It is true that he alleges in the amendment of April 24, 1922, that it is his duty to pay all claims due by the estate of his testator, but this it is submitted is not sufficient to give him the right to come into this court; he also alleges by that amendment that it is his duty to "protect the title and possession of said trustees in all of said

property, including said real estate." There is no law which imposes upon an executor, the duty of protecting title and possession of property after he has assented to the legacies passing under a will. This, plaintiff by his own allegations, shows has been done.

These allegations are made for the purpose of trying to bring the case under some recognized Head of Equity Jurisdiction, which plaintiff no doubt recognizes must be done before he can come into a court of equity to enjoin the collection of a State Tax, and one of these Equity Heads is that the fi. fas. would cast a cloud upon real estate. Before this can be done however, he must first allege that he is in possession of and has legal title to such real estate.

The mere fact that a tax may be illegal or unconstitutional, does not give a person the right to come into a Federal Court of Equity to enjoin the same.

Union Pacific R. R. Co. vs. Board of Com'rs, 217 Fed. 540.

In the case of Milwaukee vs. Koeffler, 116 U. S., 219, 29 L. E., 612, it was held that:

> "An injunction bill to restrain the collection of a tax on the sole ground of the illegality of the tax, cannot be maintained. There must also be an allegation of fraud, or that the tax creates a cloud upon the title; that there is apprehension of a multiplicity of suits; or some cause presenting a case of equity jurisdiction."

See also Shelton vs. Platt, 139 U. S., 591, 35 L. E., 273. In that case Mr. Chief Justice Fuller in the first sentence of his opinion said:

"The question whether, even if the act under which the tax in question was imposed were unconstitutional and the tax void, complainant on behalf of the Express Company was entitled to the relief accorded, meets us on the threshold."

Then went on to say that,

"There must exist, in addition, special circumstances bringing the case under some recognized head of equity jurisdiction; such as that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or where the **property** is **real estate,** throw a cloud upon the **title** of **complainant."** . . .

"When a tax is assessed as a personal charge against the party taxed, or against his **personal property,** it is **difficult** to **suggest any ground** of equitable jurisdiction. Presumptively the remedy at law is adequate."

None of these elements are present in the case as made by the bill. In the Milwaukee case supra, it was said on page 614 L. E.:

"The property for which the tax was assessed was intangible property,"

the same as in the case sub judice. And on the same page, quoting from Dows vs. Chicago, it was said:

"Assuming the tax to be **illegal** and **void,** we do not think **any ground** is presented by the bill justifying the interposition of a court of equity to enjoin its collection. The **illegality** of the **tax** and the **threatened sale of the shares** for its payment constitute in themselves alone, no ground for such interposition. There must be some special circumstances attending a threatened injury of this kind, **distinguishing** it from a common trespass and bring the case under **some recognized head of equity jurisdiction** before the preventive remedy of injunction can be invoked. It is upon taxation that the several

States chiefly rely to obtain the means to carry on their respective governments; and it is of the **utmost importance** to all of them that the **modes adopted** to enforce the taxes levied should be interferred with as little as possible. Any delay in the proceedings of the officers upon whom the duty is devolved of collecting the taxes may derange the operations of government, and thereby cause serious detriment to the Government. **No Court of Equity will therefore allow its injunction to issue** to restrain their action, except where it may be necessary to protect the rights of the citizen whose property is taxed, and he has no adequate remedy by ordinary processes of the law. **It must appear** that the **enforcement** of the **tax** would lead to a **multiplicity** of suits, or produce irreparable injury, or, **where** the **property** is **real estate,** throw a cloud upon the **title** of the complainant."

"In legal parlance cloud upon title arises with reference to **real estate only.**"

Here there is no title to real estate in the complainant at all. The Georgia Statutes are confessedly constitutional; it is admitted that no taxes have ever been paid upon the property assessed; no fraud is shown; it is submitted that the tax is not alleged to be illegal; no irreparable injury could possibly follow by plaintiff being compelled to pay the tax, for he would only be paying upon its admitted value and that required by the Constitution and laws of Georgia. (See Texas Co. vs. Brown, supra.

In the Shelton vs. Platt, supra, the court on page 276 L. E., in discussing "irreparable injury" said:

"Irreparable injury is the sole ground upon which jurisdiction can be regarded as invoked in this case. The jurisdictional averments are: 'That the property of said United States Express Company in Tennessee is employed in interstate Commerce in the said express business,

and necessary to the conduct of it; that if seized by the said Sheriff it will greatly embarrass the company in the conduct of such business and subject it to great loss and inconvenience' and 'that your Orator the United States Express Company are without adequate remedy at law in the premises'. The latter allegation is a mere matter of inference and it is necessary that by facts averred or proven should be made out . . testing" (the bill by its averments) the court said, "we do not see how it can be sustained."

So we say with reference to the allegations in the bill in the present case touching the allegations of irreparable loss. They are mere inferences. The plaintiff has half a million dollars with which to pay and has distributed among the legatees property worth some three million dollars. To enjoin these taxes, would not the State of Georgia be the one to suffer the irreparable loss and injury? We assert that she would.

Plaintiff therefore, it is submitted, has no right to raise the question he does in this proceeding; he has no such interest as would give him the right to come into a Federal Court of Equity especially since the laws of Georgia, Acts 1918, page 232, provides a remedy for him. (State vs. Callaway, Decision March 4, 1922.)

One's own rights must be invaded to entitle him to relief, not someone else's.

Heald vs. District of Columbia, 259, U. S., 114-124, 66 L. E., 852.

The case of Stephens vs. Dublin and Lawrence Bank, 147 Ga., 62, was where a tax payer sought to enjoin the holding of an arbitration in a tax matter, demanded by another tax payer than the plaintiff,

upon the ground that the arbitration proceeding was void by reason of the unconstitutionality of the law under which it was being held. And the Supreme Court of Georgia there:

> "Held, that the plaintiff showed no such interest as would authorize him to prosecute such a suit and call into question the constitutionality of the provisions of the code section under which the arbitration was proceeding."

Speaking of the right to attack the constitutionality of a tax law, the Supreme Court of the United States in the case of Hatch vs. Reardon, 204 U. S., 160, 51 L. E., 422, said:

> "But there is a point beyond which this court does not consider arguments of this sort for the purpose of invalidating the tax laws of a state on constitutional grounds. This limit has been fixed in many cases. It is that unless the party setting up the unconstitutionality of the state law belongs to the class for whose sake the constitutional protection is given, or the class primarily protected, this court does not listen to his objections, and will not go into imaginary cases, notwithstanding the seeming logic of the position that it must do so, because if, for any reason, or as against any class embraced, the law is unconstitutional, it is void as to all.'

And again in the case of Clark vs. Kansas City, 176 U. S., 118, 44 L. E., 396, that court said:

> "Of the discrimination between owners of agricultural lands the supreme court of Kansas said the defendants in error (plaintiffs here) cannot be heard to complain. 'Their lands are not agricultural lands. At least they do not allege them to be such land, but on the contrary allege that parts of them are used for railroad purposes, and that the remaining portions are vacant and unoccupied lands held and possessed for railroad purposes. Owning no agricultural

land, the defendants in error are not affected by the discrimination which the statute makes between the different classes of owners of such kind of land, and they cannot, therefore, be heard to complain on that score. A court will not listen to an objection made to the constitutionality of an act by a party whose rights it does not affect and who has therefore no interest in defeating it."

So we say with reference to the suit in the present case. There are no allegations that plaintiff is in possession of any property of the estate of White, neither does he point out any property upon which the executions sought to be levied could posibly cast a cloud upon the title thereto. Hence the bill cannot be maintained it is insisted. In cases of the character of the one in question, as in all cases, vague and veiled allegations as to possession and invaded rights will not be accepted but they must be positive and unequivocal.

So it is in the instant case. How can Callaway, Executor be heard to attack the laws of Georgia touching the collection of taxes, when he has no title to any property that can be affected. We say he cannot.

Before a Federal Court will entertain a bill in equity to enjoin a State law, it must be alleged and proven that something which the State or its officers are doing, cast a cloud upon complainants title or the like.

The fact that the executions which have been issued by the tax receiver of Richmond County, which are sought to be enjoined, are a lien against property in the hands of legatees and trustees of J. B. White certainly cannot give a stranger to the title of such property, the right to come into a court

of the United States to enjoin the State of Georgia from attempting to enforce the collection of such fi. fas. And such is the position of the complainant in this case. So far as he is concerned the property which has passed to the legatees and trustees of J. B. White is the same as if the same was never owned by White.

As was said by Simmons, Chief Justice, in the case of Watkins vs. Gilmore, 121 Ga., on page 491:

> "After the assent of the executors . . the land in controversy was the property of the remaindermen, and the title vested in them as completely, as against the Estate and the Executors, as though it had never formed any part of the Estate."

Here Callaway had assented to the legacies, made a deed to the trustees—where are his rights being invaded? If the land was levied on he could not file a claim thereto. (Sallade vs. State, 111 Ga., 700.)

We assert that as a matter of law, Callaway as Executor never did have any right to demand an arbitration even in the State Courts, and much less has he any right to come into this court and seek to have declared unconstitutional the tax laws of Georgia.

> "A court of equity will not entertain a bill simply to vindicate an abstract principle of justice . . . and if it appear that the parties **really in interest** are content that the decree shall stand, it should not be set aside at the suit of one who could not possibly obtain a benefit from such action."

Foster vs. Mansfield C. & L. M. R. R. Co., 146 U. S., 89, 36 L. E., page 899.

See Cram vs. Chicago R. R. Co., 85 Wis. 588, 19 Ann. Cas. 125.

An averment that an assessment upon the capital stock and franchises of a corporation constitutes a cloud upon **title** is not sufficient to sustain a bill in equity which seeks to enjoin the collection of such tax as illegal, where it contains **no allegations** that the corporation **owns any** real property.

Indiana Mfg. Co. vs. Kohen, 188 U. S., page 681, 47 L. E., page 651.

In the case of Railroad Co. vs. Patterson, 154 U. S., 134, 38 L. E., 934, it was said:

> "An injunction, cannot be granted to private individuals to avert the sale for taxes of the property of others, whether exempt from taxation or not."

(c) Complainant filed to do that equity which would entitled him to be heard.

MUST FIRST PAY WHAT IS EQUITABLY DUE.
(Railroad Tax Cases.)

In Taylor case, 92 U. S., 575-618, 23 L. E., 663, and especially page 674, on the page last mentioned, the court has this to say with reference to a failure to pay that which is admitted to be due:

> "The defendants in all these cases are the Clerks and Treasurers of the Counties; the clerk who makes out the tax list, and the treasurer who collects the taxes. Theses taxes are both the State and County taxes. It is clear, from the statements of the bills and from what we have already said, that there must be in every county mentioned a considerable amount of real estate and personal property coming with the character of local tangible property, and subjected to taxation on precisely the same principles, and no other, that all other personal and real estate within the county is taxed. It is equally clear that the road-bed within each county is liable to be taxed at the same rate that

other property is taxed. Why have not complainants paid this tax? In reference to the latter, it is said that they resist the rule by which the value of their road-bed in each county is ascertained, and therefore resist the tax. But surely it should pay tax by some rule. If the rule adopted gives too large a valuation in some counties, it must be too small in others. What right have they to resist the tax in the latter case? And in the former, is the whole tax void because the assessment is too large? Should they pay nothing and escape wholly because they have been assessed too high? These questions answer themselves. Before complainants seek the aid of the court to be relieved of the excessive tax, they should pay what is due. Before they ask equitable relief, they should do that justice which is necessary to enable the court to hear them.

It is a profitable thing for corporations or individuals whose taxes are very large to obtain a preliminary injunction as to, all their taxes, contest the case through several years' litigation, and when in the end it is found that but a small part of the tax should be permanently enjoined, submit to pay the balance. This is not equity, it is in direct violation of the first principles of equity jurisdiction. It is not sufficient to say in the bill, that they are ready and willing to pay whatever may be found due. They must first pay what is conceded to be due, or what can be seen to be due, on the face of the bill, or be shown by affidavits, whether conceded or not, before the preliminary injunction should be granted. The State is not to be thus tied up as to that of which there is contest, by lumping it with that which is really contested. If the proper officer refuses to receive a part of the tax it must be tendered, and tendered without the condition annexed of a receipt in full for all the taxes assessed.

We are satisfied that an observance of this principle would prevent the larger part of the suits for restraining colection of taxes which now come into the courts. We lay it down with unanimity as a rule to govern the courts of the United States in their action in such cases."

The equitable principal enunciated in the foregoing case has been persistantly adhered to by the Supreme Court of the United States. For instance in the case of German National Bank vs. Kimball, 103 U. S., 732, 26 L. E., 469, it was said:

"We have announced more than once that it is the established rule of this court that no one can be permitted to go into a court of equity to enjoin the collecion of a tax until he has shown himself entitled to the aid of the court by paying so much of the tax assessed against him as it can be plainly seen he ought to pay. That he shall not be permitted, because his tax is in excess of what is just and lawful, to screen himself from paying any tax at all until the precise amount which he ought to pay is ascertained by a court of equity. That the owner of property liable to taxation is bound to contribute his lawful share to the current expenses of government and cannot throw that share on others while he engages in an expensive and protracted litigagation to ascertain that the amount which he is assessed, is or is not a few dollars more than it ought to be . But that before he asks this exact and scrupulous justice he must first do equity by paying so much as it is clear he ought to pay ,and contest and delay only the remainder. State R. R. Tax Cases, 92 U. S., 575 (XXIII., 6663.)

The bill attempts to evade this rule by alleging that the tax is wholly void and, therefore, none of it ought to be paid, and that by reason of the absence of all uniformity of values, it is imposible for any person to compute or ascer-

tain what the stockholders of the complainant Bank ought to pay on the shares of the Bank. In the case above mentioned this court said, in answer to the first objection: 'It is clear that the road-bed within each county is liable to some tax at the same rate that other property is taxed. Why have not complainants paid this tax? It is said they resist the rule by which the value of their road-bed in each county is ascertained. But surely they should pay tax by some rule. . . . Should they pay nothing and escape wholly, because they have been assessed too high? These questions answer themselves. Before complainants seek the aid of the court to be relieved of the excessive tax they should pay what is due. Before they ask equitable relief, they should do that justice which is necessary to enable the court to hear them.' p. 616 (674).

In the same case the court said: 'It has been repeatedly decided that neither the mere illgality of the tax complained of, nor its injustice nor irregularity, of themselves give the right to an injunction in a court of equity,' and the authorities there cited support the proposition. The whole extent of the injustice complained of in this bill is the inequality of the actual assessment, and for this it is argued the whole tax of the township is void; and as the bill seeks to bring into view the inequality as regards other counties in the State, it follows that, if the bill be sustained, the entire tax of the State for that year must be declared void, in order that complainant may be relieved of a few thousand dollars and escape taxation for that year entirely.

The case, then, made by plaintiff is this: that the shares of the Bank are taxed at the same per cent on their assessed value as all other property; that the valuation of these shares, on which this rate is apportioned, is only about half their actual value; that some other property is valued at less than half of its cash value, and for this

reason no tax should be paid on the shares of complaintant's Bank.

And if any should be paid at all, the sum which may in the end be found justly due, and which, during the four or five years of this litigation, must be paid for the support of the government by some one else, shall remain in complainant's pocket until it is ascertain precisely to the last dollar what each share should have paid.

We think the Circuit Court did not err in dismissing such a bill, and its decree is affirmed."

That case was even stronger for the plaintiff than the instant case, for in that case the plaintiff did seek to excuse itself from paying by alleging that the tax was wholly void, here no excuse whatever is offered. It is not even alleged that the entire tax is void, nor is it contended that the property in question is not subject to taxation, the sole complaint here is that the assessment is excessive. In speaking of the excuse offered in the Kimball case, as to why no payment or tender was made, the court said:

"The whole extent of the injustice complained of in this bill is the inequality of the actual assessment, and for this it is argued the whole tax of the township is void; and as the bill seeks to bring into view the inequality as regards other counties in the State, it follows that, if the bill be sustained, the entire tax of the State for that year must be declared void, in order that complainant may be relieved of a few thousand dollars and escape taxation for that year entirely."

And refused the relief sought.

The court in the case of Huntington vs. Palmer, 8 Fed., 449, in discussing the State R. R. Tax Cases, 92 U. S., 575, had this to say:

"As we understand it, the court distinctly holds that some tax, according to some rule of

taxation, ought to be paid on all taxable property, and that a bill which does not allege a payment of so much of the tax as the party concedes, or , if not conceded, may be seen from the bill or shown by affidavit ,ought to be assessed and paid, does not present any equity to justify an injunction. And the court takes particular pains to say to the circuit courts that they are expected to conform to this view. Its language is: 'We lay it down with unanimty as a rule to govern the courts of the United States in their action in such cases'."

Thereupon a demurrer to the bill was sustained.

Following this rule, the Supreme Court of California, in the case of Los Angelas County vs. Ballerino, 32 Pac., 581, held that it was not error to exclude evidence of discrimnation where the tax payer had not paid or offered to pay the equitable amount of tax due. That was a case where a suit was brought under the California law to recover taxes and,

"As one defense to the action, the defendant alleged in his answer that the assessor fraudulently and corruptly assessed his real estate at the exhorbitant valuation of $120,000, an excess of $101,400 over and above its cash value; and in this connection the answer further alleged 'that the said assessor did wilfully and fraudulently and corruptly discriminate against this defendant in making his assessments: for instance, that while he imposed an assessment on his parcel of real property at more than $800 per acre, he at the same time assessed the adjoining farm at $200 per acre, and other farms of better land at $50 per acre; that such exorbitant assessment on this parcel of real property was not from error of judgment on the part of said assessor, but it was done from corrupt and fraudulent motive, as aforesaid.' Upon the trial

the defendant offered to show by witnesses that the cash value of his property upon which the assessment in question was made in the year 1888 did not exceed $50 per acre, and he offered to show by the assessment roll for that year that 67 acres of adjoining land belonging to another person was assessed at only $15,000, or about one-fourth the amount for which the land of defendant was assessed for the same year. This offered evidence was excluded by the court, and we see no error in the ruling. It is undoubtedly true that a taxpayer may enjoin the collection of a tax founded upon an assessment fraudulently and corruptly made with the intention of discriminating against him, and for the purpose of causing him to pay more than his share of the public taxes, (Merrill vs. Humphrey, 24 Mich. 170; Lefferts vs. Board of Supervissors, 21 Wis. 688; Iron Co. vs. Hubbard, 29 Wis. 51) and it is equally true that the fact of such a fraudulent assessment would be available to the taxpayer as an equitable defense in an action brought to enforce the collection of a tax founded upon an assessment of that character. But in appealing to a court of equity for relief by way of injunction against such fraudulent assessment, the plaintiff must show by his complaint that he has paid or tendered the amount of taxes which would have been due from him if his property had been assessed at what he concedes would have been a fair valuation, and he must, in addition, offer to pay what the court shall find to be equitable and just, (Merrill vs. Humphrey, 24 Mich. 170; State Railroad Tax Cases, 92 U. S., 616; Huntington vs. Palmer, 7 Sawy. 355, 8 Fed. Rep. 449; Bank vs. Kimball, 103 U. S., 732; Montgomery vs. Sayre, 65 Ala. 564: 1 High, Inj. 491;) and we think the same facts should appear in an answer which seeks to defend against the collection of a tax upon the ground of a fraudulent assessment. Tested by this requirement, the

answer of defendant fails to state facts sufficient to constitute an equitable defense to this action growing out of such alleged fraudulent assessment. It contains no allegation that defendant ever paid or offered to pay what would have been right for him to pay upon what he concedes would have been a fair valuation of his property, nor does he offer to pay what the court shall ascertain to be just; and for this reason there was no error in excluding the evidence offered by him tending to prove the matters alleged in his answer as to the value of his land and the discrimination made against him in his assessment. Judgment and order affirmed."

See along this line also Pittsburg C. C. & St. R. Co. vs. Board of Public Works, 172 U. S., 32-38, 43 L. E., 354.

See the case of Western Union Telegraph Co. vs. Missouri ex rel. Gottlier 190 U. S., 412, 47 L. E., 1116, where on page 1122 L. E., the court, in passing upon the defense—to a suit at law to recover back taxes paid—of discrimination, said, quoting approvingly the Supreme Court of Missouri. "The defendant cannot avail itself of these cases for the reason (1) that it seeks to raise the question of discrimination by a defense to an action at law to collect the taxes, and thereby collaterally attacks the judgment of the board of equalization; (2) that such questions can only be raised by a direct attack, in equity, and **then only upon the condition precedent** that it pay or tender the amount **justly** due and only **asks** to have the **collection** of the excess **restrained.** This the defendant has not done in this case. It simply alleges a discrimnation or excessive tax, and then seeks to defeat the whole without paying or tendering anything, notwithstanding that it admits by its answer that it has property in this

State subject to taxation in the sum of $541,472.46. Upon the authority of the cases relied on by it, this cannot be done," and the Supreme Court of the United States said: "We concur in this view."

The requirement laid down in the case supra as a condition precedent to seeking an injunction, to wit, that of paying the amount justly due or tendering the same has not been met by the plaintiff. What tender he has made was made upon condition that he be given a receipt in full or that the same be accepted as in full upon the finding of an illegal arbitration. "This cannot be done" as said in the decision supra. In other words "the **condition of relief against** the enforcement of the quisi judicial order, (the assessment) which he attacks, is a tender of **payment** of the **taxes** he **ought to pay"**, page 1122 supra.

> For "no one can have an injunction against the collection of a tax until he has **paid** so **much** of the tax **assessed against** him **as it can plainly be seen he ought to pay."**

Northern Pacific R. R. vs. Clark, 153 U. S., page 252, 38 L. E., 706.

Clearly the kind of tender made in this case is not the kind of tender required. The only tender made was conditional upon a receipt in full. For instance plaintiff alleged in paragraph twenty-five that after the rendition of the award he "thereupon tendered to the said Chas. S. Bohler, Tax Collector, of said County, said sum of $27,980.88, in full payment of said taxes so claimed, has been a continuing tender, and is still tendered and offered in settlement of said taxes."

This is not such a tender as is required. Furthermore this is not the amount which should have been tendered, as disclosed by the petition, for this

award has been declared by the Supreme Court to be void, and, furthermore, if plaintiff's position be correct, that is, that he has been discriminated against, which is denied, he alleges that all real estate in Richmond County has been **assessed at 66 23% and personalty at 50% of its value. So if this were true certainly he should have tendered this amount.** See paragraph five of bill.

While this allegation is denied, and the same cannot be proven by any statement of Steed (Chicago etc. vs. Babcock, 204 U. S., 585, 51 L. E., 636) still for plaintiff to ask equity upon such showing, he should certainly be required to do equity by paying upon this valuation at least.

> "Payment, or at least a tender, of the amount of the taxes shown **from** the **bill** on **complainants own theory,** justly and equitably to be due on shares of stock in a national bank, must be made before a Court of Equity will interfere by injunction with their collection . . ."

People's National Bank of Lynchburg vs. Marye, 191 U. S., 273, 48 L. E., 180. It was further said in this case:

> "The universal rule of a court of equity is that he who seeks its equitable interposition must himself do equity. Is there any higher equity than that a citizen should pay the amount of a tax which he conceded to be just and equitable, **before** asking the aid of a court of equity to grant an injunction to enjoin the collection of any greater sum?"

The only time that a payment or tender is not necessary is where the entire tax is void, but even though some part thereof may be so, it was held in this case that that would not void the entire tax. So it is in the instant case, so far as the National Bank Stock is concerned it was simply included through

an error. The only ground of objection as to the balance is, that it is excessive. And accepting plaintiff's own theory as to what rate was systematically used in Richmond County in the assessment of property, of the character of that assessed, would make him be due upon at least fifty per cent of the tax assessed, after deducting the National Bank Stock.

> "Injunctions issue as a matter of discretion and conscience, not of right. The court may always attach equitable conditions", such as requiring the complainant to do equity by paying that which equity and good conscience should be paid."

Chicago Traction Co. vs. State Board of Equalization, 114 Fed., 557.

Again it has been held,

> "A property owner seeking to enjoin the collection of taxes because the amount is excessive should show by his bill what amount is just and what excessive, and should pay to the proper officer, the amount which he conceives to be properly chargeable against him."

Merritt vs. Humphrey, 24 Mich., 170.

In the instant case, no such tender was made prior to filing this bill, and he could not save a dismissal by paying the amount he did after the argument had been begun, for even then, he only paid that as figured on the illegal award. Therefore no relief should have been granted.

Until plaintiff paid that admitted to be due, he had no cause of action in equity, therefore it is submitted that he cannot first seek equity and then offer to do equity—he must do so in the first instance.

See in this connection: Hollingsworth vs. Flint, 101 U. S., 591, 25 L. E., 1028, Wadley Jones & Co. vs.

Jones, 55 Ga., 329, Mason vs. Atlanta Fire Co., 70 Ga., 608, Baker vs Tillman, 84 Ga., 401.

(d) The inclusion of National Bank stock along with the million or more dollars worth of other taxable property, did not authorize the court to retain jurisdiction of the cause.

For, the mere fact that a tax is illegal or unconstitutional does not of itself give a person the right to go into a Federal Court of equity.

Union Pacific R. R. Co. vs. Board of Comm'rs, 217 Fed., 546.

Milwaukee vs. Koeffler, 116 U. S., 219, 29 L. E., 612.

Shelton vs. Platt, 139 U. S., 591, 35 L. E., 273, and other cases cited under the last heading above.

It is respectfully submitted that none of the authorities cited by the lower court sustain its position with reference to the retention of such case in the Federal Court. There was no question as to its jurisdiction as an original proposition, as seems to have been assumed by it, but the question was that the State statutes having provided an adequate remedy a Federal Court of Equity should have remanded the complainant to the State Courts.

For instance, the case of Stanley vs. Board of Sup'rs of Albany Co., 6 Fed. 561, decided in 1881, is cited. That case is not at all in point. There the plaintiff sued in the Federal Court to recover taxes that had been paid upon National Bank stock. It was not an injunction brought to enjoin the tax officers of a State as here. This will be seen by reference to the decision of the Supreme Court of the United States reversing the lower court in that case reported in 105 U. S., 265, 26 L. E., 1044.

The court after citing the foregoing case, then uses this language: "As to discriminatory taxation, **and there being no right in Georgia** to pay an illegal tax and recover the same," and then cites certain other decisions. This would seem to indicate that the court

was of the opinion that the State law must provide that the taxes should be paid and then for a suit to recover them back. This is clearly not the rule. Any law which allows the tax payer to fully protect himself in the State Courts is sufficient.

In the case of King vs. Portland, 184 U. S., 61-69, 4 6L. E., 431, the Supreme Court of the United States on page 436, L. E., said:

> "The manner of notice and the specific period of time in the proceedings when he may be heard are not very material, so that reasonable opportunity is afforded before he has been deprived of his property or the lien thereon is irrevocably fixed. So it has been held that it is sufficient if the party is accorded the right of appeal or to be heard upon an application for abatement (see Towns vs. Klamath County, 33 Or. 225, 53 Pac. 604; Weed vs. Boston, 172 Mass. 28, 42 L. R. A. 642, 51 N. E. 204), or the assessment is to be enforced by a suit to which he is to be made a party (Hagar vs. Reclamation Dist. No. 108, 111 U. S., 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; Walston vs. Nevin, 128 U. S., 578, 32 L. ed. 544, 9 Sup. Ct. Rep. 192), or the right of injunction against collection is accorded, by which the validity of the assessment may be judicially determined. McMillan vs. Anderson, 95 U. S., 37, 24 L. ed. 335. In such case he cannot be heard to complain that his property is being taken without due process of law. The case of Paulsen vs. Portland, 149 U. S. 30, 37 L. E. 637, 13 Sup. Ct. Rep. 750, covers the question of the right to notice and a hearing quite fully, and it is signfiicent that special reference is made to the ten days' notice required to be given under Sec. 104 of the charter as it then stood, after the assessment had gone upon the docket of city liens and before collection can be proceeded with, which is almost the exact provision now contained in Sec. 141. While the court at the

time declined to decide that such a notice was sufficient, yet, if the cause had been dependent upon it alone, it is not altogether clear that it would have held it insufficient. So it was held by this court, in conformity with the prevailing rule, that if provision is made for notice to and hearing of each proprietor at some stage of the proceeding upon the question of what proportion of the tax shall be assessed upon his land, there is not a taking without due process of law."

Singer Sewing Machine Co. vs. Benedict, 229 U. S., 488, 57 L. E., page 1291.

Again in the case of Davidson vs. Board of Adrs. of New Orleans, 96 U. S., on pages 105 and 106, 24 L. E., 619 and 120, the Supreme Court of the United State said:

"That whenever by the laws of a State or by State authority, a tax assessment, servitude or other burden is imposed upon property for the public use, whether it be of the whole State or of some limited portion of the Community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, of such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections."

IN-ADMISSIBILITY OF COMPLAINANT'S EVIDENCE.

The two injunction suits introduced by complainant, set out in detail in the assignment of errors No. 1, Record p 380-416, the first being a petition in equity brought by the State to enjoin the holding of the arbitration which had been demanded, and the second being a petition in equity to set aside the award returned by such board of arbitrators, were

clearly inadmissible, because:

(a) The first case was simply a refusal to grant a temporary injunction against the holding of the arbitration, in which the Act of 1918, was not considered by the court; and adjudicated nothing against the interest of the State, nor did the record thereof contain any fact which legally established any fact that would aid complainant.

(b) The arbitration having been held after the passage of the Act of 1918, page 232, copied above, was wholly void, and so held by the Supreme Court of Georgia in State vs. Callaway, and so held to be by the lower court in this case. Therefore a copy of such record could not illucidate any issue before the court of illegal unconstituional discrimination. Certainly if the award was void, it could have no probative value. Yet from a reading of the opinion of the lower court, it will be observed that he gave much weight thereto—in effect adopting such illegal finding as his judgment. It amounted to no more than if the three arbitrators had written the court a letter giving their opinion and this letter had been objected to, but admitted and considered. Certainly this would have been error, and so was the admission of this record. It was no more than hearsay.

Steed, Tax Receiver, incompetent witness to impeach official acts.

The second assignment of error to the admission of evidence was to that of Steed, Tax Receiver, offered by complainant. This testimony was in substance as follows:

Direct Examination: Was Tax Receiver in 1918, remember the assessment placed upon securities of J. B. White for 1918 by Board of Equalizer it was

$250,000; remember the Jack Estate, it was assessed at $150,000. If entire returns for last year of stocks and bonds was $428,000, that would leave to the balance of the County 132,000. I did not follow literally the figures of the affidavit (meaning that of McPherson and Dugal as to values) in the assessment; in a hurry put some figures down, I think probably $150,000 too much as they don't talley. We had a rule not to assess for full market value. In starting out where there is no arbitration, I would probably make the assessment at full market value, but when it got down to arbitration, I would most always take the first assessment and put it down, and if the parties forced me to an arbitration, settle on some basis later on, lower than the full market value. The Board of Assessors never go over two-thirds valuation on mortgages, stocks and bonds. I have not been doing that. When I make assessments, it is generally in accordance with the property value. I have never undertaken to assess any property at its full market value. I know of other large estates which have been administered here which I have not undertaken to assess. It has not been brought to my attention. I begin to see I will have to go after them. So far I have not done so, I have not been ordered by the Comptroller General to go after them. I did have one estate that I had an adjustment in—the Benson Estate. Had instructions from the County Commissioner, it was not arbitrated. We settled it with Mr. Hamilton Phinizy and Pierce Bros., who represented the Benson Estate. We started out on full market value and I think we settled on about 33 1-3 per cent.

Cross Examination: I never reported any of these instances that Judge Callaway asked me about

to the Comptroller General. To be candid with you, I have never examined those records. I knew of those estates in a general way. The State's taxing authorities outside of its being represented by me, don't know anything about them. I didn't think I had anything to do with them until this case came up, etc.

I have never had a tax payer come in to make his returns and state he had $1,000,000 and tell him "I will assess you at $200,000." If you make a return of $100,000, I put you down at $100,000. If you come to me and make your return and say, "I have $1,000,000", I put you down at $1,000,000." Record 310, P____.

It is submitted that it was altogether improper to subject this officer to an examination as was done in this instant as to how he made the assessments in question, or as to how he had made other assessments; and allow him to give evidence of such a character as would tend to impeach his official acts touching the assessments in question. Of course the object of the executor in eliciting this evidence was to try and show that Steed, Tax Receiver, had not theretofore done his duty by assessing property at its full value as required by law, and thus show discrimination against him. We submit that this evidence was wholly improper.

In 22 R. C. L. paragraph 147, page 474, it is said:

"An officer when he performs an act, in the course of his official duty, cannot be heard to say what he intended thereby. The law attaches consequences to the act without reference to the private intention of the officer. He has no power to explain away his legal acts, or their effect. To do so would give effect to the intention of the officer rather than the law. And it is a familiar principle that a public officer mak-

ing a return of his doings on a writ shall not be allowed to gainsay the truth of it."

Clearly to admit or consider Steed's testimony for the purpose of impeaching the assessments in question would be to violate these fundamental principles of law. It would be to allow any unscrupulous tax receiver to upset every assessment he might make and thus greatly embarras the State in the collection of her revenues. Clearly this will not be done.

In the case of Illinois Central R. R. Co. vs. Commonwealth, 108 S. W., 245, on page 246 the court said:

"The defendant introduced on the trial, Samuel H. Stone, one of the Auditors of the State in the year 1898 and as such, a member of the Board who made the assessment, upon which the suit is based. He testified on the trial, which took place, in October 6, 1905, in substance that although the board made the assessment and sent out notice of it and at the end of thirty days sent out the final notice of assessment, they were unwilling to force a conclusion because they were not sure of their ground and in the winter of 1899 they had a consultation with the railroads of the state, and in this consultation with the railroads in the year 1899 they agreed that the assessments then made against the Illinois Railroad should be in full, not only for that year but for the previous year.

In passing upon this testimony, the court said:

"The testimony of an assessor who makes an assessment cannot be received after his term is out to show that he did not consider his assessment a valid act or final. The board made the assessment in the way that all other assessments were made. It gave notice of the assessment to the railroad company as required by statute and at the end of thirty days it gave notice as provided by the statute, that the as-

assessment had become final. When this had been done the matter passed beyond the control of the board . . . No reliance could be placed in such proceedings if the validity of the record was made to depend upon the secret intentions of the assessing officer. The validity of their actions depends upon what they do, and not upon their undisclosed purposes."

The foregoing case was reversed in the Supreme Court of the United States and the foregoing ruling affirmed. Illinois Central Railroad vs. Kentucky, 218 U. S., 551, 54 L. Ed. 1147.

After Steed had assessed the property in question, the matter "passed beyond (his) control" and he cannot now be heard to impeach his official act by testifying that he did not intend his action to be final; nor can he testify as to his violating his duty by assessing property differently from the method required by law.

And in the case of Chicago B. & Q. R. Co. vs. Babcock, 204 U. S., 585, 51 L. E., 636, at page 638, it was held:

"When we turn to the evidence there is equal ground for criticism. The members of the board were called, including the Governor of the State, and submitted to an elaborate cross-examination with regard to the operation of their minds in valuing and taxing the roads. This was wholly improper. In this respect the case does not differ from that of a jury or an umpire, if we assume that the members of the board were not entitled to the possibly higher immunities of a judge. Bucklough vs. Metropolitan Bd. of Works, L. R. 5 H. L. 418, 433. Jurymen cannot be called, even on a motion for a new trial in the same case, to testify to the motives and influences that led to their verdict . . . Wilcox vs. United States, 180 U. S., 149, 36 L. E., 967, 12 Sup. Ct. Rep. 30. So

as to arbitrators. Buccleuch vs. Metropolitan Bd. of Works, L. R. 5 H. L. 418, 457, 462. Similar reasoning was applied to a judge in Fayerweather vs.Ritch, 195 U. S., 276, 306, 307, 49 L. E., 193, 213, 214, 25 Sup. Ct. Rp. 58. A multitude of cases wil be found collected in 4 Wigmore on Evidence, SS 2348, 2349. **All** the oftenrepeated reasons for the **rule** as to **jurymen** apply with **redoubled force** to the attempt by exhibiting on cross-examination the confusion of the members minds, to attack in another proceeding the judgment of a **lay tribunal**, which is intended, so far as may be, to be final, notwithstanding mistakes of fact or law."

The foregoing case was approved in the case of Newport Mining Co. vs. Ironwood, 185 Mich, 152 N. W. 1088, holding assessment by State board of Tax Commissioners based upon valuation of mining made by expert including mineral value of land, cannot be impeached by testimony of member of Board. Allen vs. State, 116 L. E., 534.

Also in Boston & M. R. R. Co. vs. State, 76 N. H. 91, 79 Atl. 703, holding on appeal for abatement of taxes that members of State Board of Equalization cannot be inquired of as to operation of their minds in valuing railroads.

And again in Eau Claire vs. Eau Claire Water Co. 137 Wis. 529, 119 N. W. 560 holding that testimony of arbitrators cannot be used to impeach their award.

There are 20 other asignments of error set forth fully in the assignment of errors, numbered from 3 to 23 (Record 385-421, P____.) To attempt to restate them together with the full substance of the evidence would be but duplication and to unnessarily lengthen this brief. For this reason, we shall discuss them as follows:

(3) Affidavit of John W. Dickey, giving his opinion that considerable stocks and bonds were owned by tax payers of certain counties and not returned, without giving the name of a single person, the amount he owned, the value thereof, or whether owned on any taxable date for any year; (4) the affidavit of Rufus H. Brown, as to the amount of money on deposit in the Banks of Augusta during certain years, but giving the names of no owners thereof, etc., was no evidence showing discrimination against White's Estate and was clearly inadmissible. And so with reference to (5) the affidavit of E. H. Callaway, of August 20, 1919, and (6) the joint affidavit of Jas. S. Bussey, Jr., and Henry G. Howard, of August 20, 1919, giving amount of security deeds they found of record uncancelled on certain dates. Neither of these affidavits give the owners' name of any of the deeds, nor that all taxes against them had not been paid. (7) Next an affidavit of E. H. Callaway, executor dated August 23, 1919, as to his examination of Ordinary's Office and there finding a number of inventories of file of property as owned by various decedents at the date of their deaths. Certainly this affidavit gave no facts that even tended to show any discrimination. Such property may have been owned at the date of the deaths of said parties, but this was no proof that they owned the same on any of the taxable dates for the years 1911- 1917, nor the value thereof; nor that the Tax Receiver knew of it and intentionally refused to tax the same. (8) Then certain extracts from the Comptroller General's reports showing amount of property as appeared to have been returned. None of which showed that any property in Georgia had been assessed at any per centum of

value, etc. This report was clearly inadmissible—it showed no names of any tax payers who had been allowed to return their property at anything less than its fair value. It gave the names of no individual owners of property or the value thereof. (9) Extract from annual report of H. J. Fulbright for year 1920, which contained a resume of his acts and doings for 1918, etc., in which he stated that values were not ordered reduced because the same had not reached the 100% required by law; that in 1919 the whole State was enjoying prosperity of such an unusual character as to very much inflate values and for that reason he did not think it wise to insist on a strict compliance with the law, requiring all property to be returned at its full market value; that he decided on 35% as a basis of equalization; that he set out his estimate of the true values of land as of Jan. 1, 1920 and his estimated per cent. of same as shown by the Tax Digest sent in from 56 to 60%.

This evidence showed no discrimination against plaintiff. The same merely gave the opinion of Fulbright; it was not sworn to nor did it have any reference to any of the tax payers 1911-1917. Fulbright was Tax Equalizer for the entire State. He had no assessing powers over the property of any individual tax payer. It gave the names of no persons owning any such property as that which had been assessed in this case, which had not been returned; or which the tax officers of the state had allowed to escape through any intentional systematic rule; nor did it show any such rule existing among them whereby such property was assessed at any per cent. of its value where the same had been returned. It was therefore clearly inadmissible for

See also First National Bank vs. Chapman, 17
U. S., 205, 217, 43 L. E., 669, 674.

First National Bank vs. Ayers, 160 U. S., 66(
40 L. E., 573.

the purposes offered. It referred to an entirely different year.

(10) Affidavit of E. H. Callaway, Executor, of September 18, 1922, wherein he swore as to an examination of certain inventories of estates as appeared of file in the Ordinary's Office, but which failed to state that any of said property was owned on any of the taxable dates for any of the years in question, and that these facts were brought to the attention of the Tax Receiver of Richmond County, certainly was not admissible as proof of unconstitutional discrimination against the estate of White. (11) Assessment made by the Tax Equalizers for the year 1918 of $250,000 was no evidence that Steed in making the assessment for the years 1911-1917 illegally discriminated against White's Estate. Especially in view of the fact that that Board had no right to make assessments for any previous years, and the circumstances under which the same was made, such as the appearance of Callaway, Executor, before them, contending with them as to such assessments. (12) Affidavits of J. B. Clews, of August 5, 1919, as to what J. B. White owed his firm during the years 1911-1917. This certainly could not show discrimination. The laws of Georgia allows no deduction of the indebtedness due by him when returning property for taxation, therefore such evidence was clearly inadmissible on the issues involved.

Central of Ga. Ry. Co. vs. Wright 166 Fed., 153 and 124 Ga. 630.

(13) Report of Tax Commission appointed by the Governor in 1918 and made in 1919. This report merely contained a general resume of tax matters in Georgia as they viewed it, giving the opinion of the Board of values and what per centum appear-

ed to have been returned. This report was nothing more nor less than hearsay, it could have no probative value touching the issues involved. It did not contain the name of a single tax payer or the amount of property, or the kind that had been assessed, which was owned on any of the taxable dates of any of the years in question, known to the assessing officers of the State. Furthermore it had no reference to any of the years 1911-1917. This commission did not come into existence until 1918, and certainly its report was wholly improper evidence to be considered in a case like the one at bar. (14) Extract from report of John C. Hart, State Tax Commissioner for 1914, giving a resume of tax conditions as he viewed them; and (15) an address of Henry J. Fulbright, State Tax Commissioner, dated Jan. 1, 1919, directed to the County Tax Officials in which he stated he had sought to obtain information as to real values in order to compare them with returned values; that he adopted country real estate as a basis of computation and had compared such values with the average returned values, and that the aggregate amount as shown on Tax Digests submitted to him of all property returned in the State, was $982,623,580, and that in his opinion this represented about 32 6-10 per cent. of the actual values of such real property owned in the State, etc.

In the first place this was a year subsequent to the years in question; second, Fulbright was not an assessing officer and was stating an opinion only. These reports were not sworn to and were in no way dealing with assessment of unreturned property for any of the years 1911-1917, and were certainly not the character of evidence necessary to prove that Steed, Tax Receiver, of Richmond County, had in-

tentionally discriminated against the Estate of White in 1919, in making the assessments complained of for back taxes. (16) Inventories of the several estates set out in this assignment of error, showing that the parties named, at date of their death, owned certain property, it is submitted was no proof of discrimination against complainant; as well as (17) the tax returns of said parties for the years 1911-1817. That they owned certain stocks and bonds at their death was no proof that the same was owned when they made their returns. The court wil note that when the assessment of the property in the instant case was first sought, it was on this ground that the Tax Receiver balked, and the court would not compel him to act until proof was submitted of the ownership of the property by White and its value on the taxable dates in question. Then certainly when such evidence was urged against the assessments made under the circumstances as those in question, the same should have been rejected; (19) Affidavit of J. P. Verdery and Hal K. Lowrey, members of the Board of Equalizers of Richmond County as to assessment made by their Board for year 1918. Certainly these affidavits were not proper evidence in a case like the one sub judice. This Board was limited in its authority to current years. It shows that Callaway, executor, was before it, that such Board was apprehensive that the question of White's alienage might defeat all taxes against said property and it was under these circumstances that their assessment was made for that year. Clearly this was no proof that when Steed, Tax Receiver, made the assessments that he did for the years 1911-1917 for back taxes upon unreturned property, when the

value thereof was undisputed, acted in contravention of the Fourteenth Amendment to the Constitution of the United States. Then again the action of one Board for an entirely different year should not be received as evidence to upset the acts of the Tax Receiver for previous years. The affidavit contained no proof that other property of like kind was assessed at any per cent. of its value. It may have tended to show that there were some tax dodgers in Richmond County and that affiants had violated their duty in certain instances but certainly they had no power to impeach the act of Steed by showing their illegal acts if such it did tend to prove. (20) Affidavit of H. R. DeJarnette, member of Tax Commission appointed under act of August 20, 1918, wherein he gave his opinion of tax values, etc., and figuring from Comptroller General's reports, he stated that he did not think the returns of stocks and bonds over the State showed more than 5% of the amount really owned, etc. It is submitted that this affidavit was wholly irrelevent and without probative value. It did not give any facts, but only stated conclusions. Furthermore, affiant stated it was impossible to get any reliable information upon which to base his conclusions with reference to stocks and bonds in foreign corporations, owned by any of the tax payers of Georgia, but that he had accepted as true certain figures and then proceeded to estimate what percentage of value, in his opinion, the same appeared to represent. He did not give the name of a single tax payer who owned any property on any of the taxable date for any of the years 1911-1917 inclusive; nor the value thereof, nor that the taxing officials of the State had notice of such individual tax payer who owned such property dur-

ing said years on said taxable dates, nor that the tax receivers of said State intentionally, uniformly and systematically refused to assess such property or to require a return thereof for taxation where they knew of its existence, ownership and value on the taxable dates for said years 1911-1917 inclusive.

Complainant then introduced 3 affidavits from Morgan County; 3 from Wilkes County; 3 from Floyd County; 3 from Habersham County; 3 from Coweta County; 3 from Chatham County; 1 from Richmond County; 3 from Bibb County; 3 from McDuffie County; 3 from Putnam County; 3 from Troupe County; 3 from Columbia County; 3 from from Burke County, set out in assignment of errors as numbers 21 and 22.

All of these affidavits were of like import. Each one contained a copy of tables taken from the Comptroller General's Reports showing amount in value of different kinds of property which appeared to have been returned in the several counties during the years 1911-1917, and all stated that, figuring therefrom, in their opinion, said tables did not represent more than 20% of land, 10% personalty, and 5% of stocks and bonds, as were owned by the tax payers of these counties.

The grounds urged against the admissibility of these affidavits were as follows:

(a) Because all of said evidence is irrelevent and contains no facts which illucidate the issue involved in this case.

(b) Because each of said affiants merely gives his opinion of what percentage of property is returned in his county as it is nowhere stated in said affidavits what is the value of the taxable property in any county.

(c) Because affiants have accepted as true, certain figures which they say were copied from the reports of the Comptroller General and then proceeded to estimate what percentage of the value of property in said Counties the same representd, without showing the value of any property located in any single County, upon which to base said calculation.

(d) Because the only average of any percentage value as shown by the figures copied from said Comptroller General's report appears under the head of "Average Value of Improved Lands", and this merely the average value per acre of land; under the head of "Stocks and Bonds", such figures do not purport to give any average value, or percentage of value of any such property in said Counties, and such parts of said affidavits are wholly without probative value, irrelevent and inadmissible.

(e) Because none of said affidavits state what is the value of a single piece of property located in any of said Counties; nor do they give the names of the owners thereof; nor whether the same was owned on any taxable date in any one of the years in question.

(f) Because none of said affidavits contain any facts which show any systematic, illegal, unconstitutional discrimination practiced by C. A. Steed, the Tax Receiver who made the assessment complained of.

(g) Because all of the affidavits referred to herein show upon their face that they are mere stereotyed affidavits and contain no facts within the knowledge of those making them, as to what is the actual market value of any property in any county; nor at what value a single piece of property

was returned for taxation; each one of said affidavits purports to give only an opinion, and that, not of the one making the affidavit, but the person drafting such affidavit.

The foregoing briefly stated was all of complainant's evidence.

After complainant had closed, respondents, appellants herein, moved to exclude all of this evidence upon the ground that it "did not show any systematic, intentional, illegal, unconstitutional discrimination against plaintiff as inhibited by the Fourteenth Amendment to the Federal Constitution."

We shall discuss the foregoing objections as a whole for a moment. This court will take judicial cognizance that there are some 160 counties in Georgia, and it will be seen that complainant brought forward affidavits from but 13 counties out of the 160 in an effort to bring upon the tax officials of Georgia the condemnation of having violated the Fourteenth Amendment to the Constitution. We assert that this cannot be done. These affidavits contained merely an estimate or guess of those making them. The several extracts from the reports of the Comptroller General and those of Hart and Fulbright, Tax Commissioner, one for 1914 of Hart, and one for 1918 of Fulbright, proved nothing in the way of illegal discrimination against complainant.

RULE AS TO ADMISSIBILITY OF EVIDENCE.

It is submitted that in order for any of the foregoing evidence to have been admissible, it should have shown that Steed, Tax Receiver, as well as the other Tax Receivers over the State knew the individual owners of such property, knew the amount and value thereof on the taxable dates for the years 1911-1917, and refused to assess the

same. In others words, it should have shown who the owners were; the amount of property owned, and the value thereof, on Feb. 1, 1911, January 31, 1912, January 1, 1913, January 1, 1914, January 1, 1915, January 1, 1916 and January 1, 1917, the taxable dates for those years, and that Steed and the other Tax Officers had such knowledge, and having such knowledge, intentionally refused to assess the same, or assessed the same at less than its known value. For it was upon property owned on these dates only that the State had any claim or lien for taxes. The evidence submitted wholly failed to show this essential fact and therefore was, in the first place inadmissible, and second, was wholly without probative value as to discrimination.

Pittsburg C. C. & St. Co. vs. Backus, 154 U. S., 421, 38 L. E., 1031.

Sundry Lake Iron Co. vs. Wakefield, 247 U. S., 350, 62 L. E., 1154.

At this point we desire to call the Court's attention to the fact that in none of the decisions of this court where discrimination was claimed, was there any objections urged against the admissibility of the evidence brought forward to prove the same, as was done in the instant case.

For instance in Coulter vs. L. & N. R. R. Co. 196 U. S., 599, 49 L. E., 615, no objection was interposed and yet the court held the evidence there insufficient to establish discrimination. In the case sub judice the evidence is even weaker than there. The entire evidence offered to sustain the claimed discrimination consisted of 7 affidavits made by residents of Richmond County, 3 of which were made by complainant himself; and 3 separate affidavits

from 12 counties, and four from another county. None of which gave the name of a single owner of a single dollars worth of property on any of the taxable dates for any of the years 1911-1917, and that the Tax Receivers knew the owners thereof and its value and then refused to assess the same. The other evidence consisted of extracts from Comptroller General's for 1911-1917; an extract from a report of John C. Hart, State Tax Commissioner for 1914; extracts from report H. J. Fulbright, State Tax Commissioner for the year 1920, and an extract from an address of said Fulbright for the year 1919. None of these reports even purported to be dealing with unreturned property. And Fulbright's report were for subsequent years to 1917. None of the evidence showed what amount of stocks and bonds in foreign corporations were owned by the tax payers in any county or throughout the State on any of the taxable dates for any of the years in question which had not been returned by the owners thereof, and that the same was known to the tax officials and they deliberately refused to assess the same. Nor did the evidence contain any transcripts of deeds showing the price at which land was sold throughout the State and by comparison its assessed value, whereby an approximate estimate could have been reached as to what percentage it had been assessed. There were no statistics of the United States Government as to values of property in the State, etc., as was shown in the case of Chicago, M. & St. P. Ry. Co. vs. Kimball, 278 Fed., 299, nor was the proof submitted of the character of the evidence submitted in Taylor vs. Louisville & N. R. R. Co. 88 Fed., 350; or in Louisville & N. R. R.Co. vs. Green, 244 U.S., 522-554, 61 L. E., 1281 etc., a detailed statement of which

is set out in 230 Fed., 227-231. In those cases the character of evidence offered was not objected to and yet the court in the Green case 230 Fed. criticises the complainants for not going further than they did.

In the Kimball case, 278 Fed., supra, there were introduced statements of all recorded deeds in the State of Iowa from January 1, 1920, to August 1st, 1921, from 97 counties out of 99 counties in the State; besides United States census reports and affidavits from competent witnesses from practically every county in the State. In the instant case it is submitted that none of the evidence submitted was admissible on the issues involved.

III.

NO DISCRIMINATION.

We shall now proceed to a discussion of the 6 general assignments of error which go to the case as a whole, and shall abbreviate a statement of them and discuss them in the following order.

Touching 1 and 2 of the general assignments we submit the following.

Burden of proof was on complainant to prove discrimination to all intents and purposes and this burden he failed to carry.

> "A Federal Court will not enjoin the collection of State taxes . . . because of undervaluation of other property in the State, where such inequality is not the result of a **scheme** or **agreement among the tax officers.**" Chicago B. & Q. R. Co. vs. Babcock, 204 U. S., 585, 51 L. E., 636.

And in Southern Ry. Co. vs. Watts, 258 U. S., _____, 67 L. E., 199, it was held that "**unless it is shown that the undervaluation was intentional**

and systematic, unequal assessment **will not be held** to **violate** the **equality** clause" of the Federal Constitution.

Citing Sunday Lake Iron Co. vs. Wakefield, 247 U. S., 350, 62 L. E., 1154; Chicago, Burlington & Quincey Ry Co. vs. Babcock, 204 U. S., 585, 51 L. E., 636; Coulter vs. L. & N. R. R. Co., 196 U. S., 599, 49 L. E., 615; and Sioux Bridge Co. vs. Dakota Co. 258 U. S.. _____, 67 L. E., 220.

In the Wakefield case supra, Mr. Justice McReynolds in rendering the opinion of the court said: **"The good faith of such officers** (having reference to tax officers) **and the validity of their actions are presumed; when assailed, the burden of proof is upon the complaining party."** Citing a number of cases.

Fort Smith Lumber Co. vs. Arkansas Ex. Rel. Arbuckle, 251 U. S., 532, 64, L. E., 396.

New York vs. Barber 179 U. S., 279, 45 L. E., 190. In the last case this question is discussed at length.

We submit that the foregoing authorities fully sustain the contention asserted; and that complainant wholly failed to carry such burden. In otherwords, cases of the character of that sub judice, cannot be tried by any such rule as **"the conclusion known of all men,"** to use the language of the court below in its opinion. On the contrary, such cases must be proven to all intents and purposes by "tangible facts" (Fayerweather vs. Ritch, 195 U. S., 276, 49 L. E., 193) as "no latitude of intention should be indulged in a case like this. There should be certainty to every intent" as was said by this court in the case of Ah Sin vs. Wittman, 198 U. S., 500, 49

Louisville Trust Co. vs. Stone, 107 Fed., 305, a decision rendered by the late Justice William R. Day, at that time, Circuit Judge for the Sixth Circuit.

We quote from the case of Georgia R. R. vs. Wright, 125 Ga., page 605, the following:

"**It was contended that there is a uniform custom prevailing in this State for taxpayers to return their property at less than its value. If there is such a custom, it did not have its origin with the tax officers of this State;** and there was evidence from which the judge could find, even if it did not constrain him to find, that taxpayers conforming to such a custom did so without the consent or authority, and over the protest of the tax officers of the State. The law of this State requires that each taxpayer shall return his property for taxation at its true market value. The record discloses that the attorney-general of the State has so advised the comptroller-general, and that the comptroller-general has so instructed the subordinate tax officers of the State. It certainly cannot be held that a denial of the equal protection of the laws results to this plaintiff from a custom of taxpayers in contravention of law, which has arisen over the protest and against the instructions of the tax officers of the State. It would be a startling proposition to say that no person should be required to pay his taxes, because some citizens are shrewd enough or unscrupulous enough to succeed in having their returns received by the tax officer when the valuations are lower than the law requires, and lower than the oath which each taxpayer makes to his return requires. There may be persons within the limits of the State, probably many, who have avoided the burdens of taxation, either by not returning their property for taxes or by returning it at a value lower than its true market value. But the evidence in this case authorizes, if it does not require, a finding that the tax officers of this State were not parties to such a practice. The administration of the tax laws of a State will

not be declared to be in violation of the fourteenth amendment to the constitution of the United States, unless it appears that the officers charged by the law of the State with the collection of taxes knowingly, wilfully, and intentionally administer the law so as to place upon one person or class a burden from which another person or class similarly situated is relieved. The record does not disclose that such a case has been made out against the tax afficers of the State of Georgia. Mistakes may have been made in the reception of the returns of some taxpayers. Mistakes may have been made in the assessment of property in given instances. But there is nothing in the record to authorize the conclusion that the comptroller-general or the subordinate tax officers have in any instance wilfully, knowingly, or intentionally administered the law so that it would be harsh, burdensome, or oppressive as to one, and relieve another similarly situated from like burdens. As said by the Supreme Court of the United States, this is a matter of proof. 'No latitude of intention should be indulged in a case like this. There should be certainly to every intent'. Even if the proof does not show a perfect and exact administration of the law, it fails to show such an administration as would bring down upon the heads of the officers the condemnation of the supreme law of the land, which denounces an administration 'with an evil eye and an unequal hand'."

The case of Union Tanning Co. vs. Commonwealth, 96 S. E., (Va.) 780, is directly in point for the respondents in the case at bar. In that case the Union Tanning Co. was assessed for omitted property for the years 1908 to 1915 inclusive, in the year 1916. The Company had made returns for taxation for such years, but the property assessed in 1916 was omitted. On a trial of the issues raised involv-

ing the assessments made in 1916 for said years, the court refused "to admit evidence, which if admitted, would have shown that such of the intagible personal property or capital of said company as was in Giles County in 1908 to 1915, inclusive, was assessed as the same kind belonging to all the citizens of Giles County during those years, and was assessed at a lower percentage of its value than the law required, and than was made in the 1916 assessments complained of, and in holding that such facts were immaterial," and in passing upon the contention, the court on page 788 said:

"One position of said company on this subject is, in substance, that, to the extent above mentioned the assessment of omitted taxes in 1916, for the years 1908 to 1915, inclusive, is an assessment of its property at a higher rate than has been assessed in Giles County against all other owners therein of the same kind of property during these years. That this has been a denial to said Company of due process of law and of the equal protection of the laws guaranteed to it by the fourteenth amendment of the Constitution of the United State; and the following authorities are relied on to sustain such position, viz: Green vs. Louisville etc. R. R., 244 U. S., 499, 61 L. E., 1261, Taylor vs. Louisville etc. R. R. Co., 88 Fed. 350. An examination of those authorities discloses that it is a systematic intentional discrimination by those administering the tax system of a State (whether as directed by statute or contrary to statute), against a person, by an assessment of the property of such person at a higher rate of valuation than that applied to the same kind of property of other persons whose property is taxed in the same jurisdiction, which is condemned by such authorities and held to be a denial to the person first referred to, of the due process of law and

the equal protection of the laws guaranteed to them by the Federal Constitution. This becomes more apparent from an examination of the many authorities on this subject . . . But where there has been no discrimination between persons or classes of persons but the property of the like kind of all persons in a given jurisdiction has been undervalued in its assessment for taxation contrary to law . . . does not fall under the ban of the authorities aforesaid, ... If there be, not a systematic intentional discrimination between persons or classes of persons owning the same kind of property in the making or in the correction of assessments, such action does not fall within the principal of the cases relied on by said Company as aforesaid."

In State vs. Hall, 172 Ala., 316, 54 So., 651, it was said:

"On the trial in the court below the defendant, Mrs. Hall, was allowed, over the States' objection to show that it was the custom of the County Commissioners (of Mobile County) to assess property at 60 per cent of its fair market value. The undisputed evidence showed that the fair market or real value of the property in qustion was $20,000.00, but the court charged the jury, 'if you are reasonably satisfied from the evidence in this case that in the County of Mobile there is an established custom or rule, for assessing the citizens at 60 per cent. of its cash valuation, then the court charges you that this rule must govern you, and you must, in fixing the valuation of the property, fix its value at 60 per cent. of what the evidence reasonably satisfies you is the fair market value of the property'. In allowing evidence of such a custom to go to the jury and charging them to be governed by it, there was a palpable violation of the statute, etc." "It was insisted for the appellee, that if her property be assessed at its fair cash value,

this would result in the denial to her of the equal protection of the law, and hence be a violation of the fourteenth amendment to the Federal Constitution, because the basis for asessments adopted by the board of revenue of Mobile County is only 60 per cent. of that cash value and other property owners are enjoying the benefits of this partial basis of assessment."

It was held that such was not illegal discrimination. See Florida Central R. R. Co. vs. Reynolds 183 U. S., 471, 46 L. E., 283.

We especailly invite the court's attention to the case of Magnolia Bank vs. Board Supervisors Pike Co., 3 A. L. R., 1365, and the very comprehensive note attached thereto upon this subject.

The language of the lower court, it seems to us, shows that the tax officials of Georgia were not the instigators of any rule whereby the tax payers in the State had refused to return their intangible property such as stocks and bonds in foreign corporations. As witness: "I have not overlooked the requirement of the statutes that property must be returned or assessed at its true market value; that taxing officers claim not to be respoonsible for false returns; that the Comptroller General urges that the law be complied with; and that the Tax Receiver of Richmond Counyt and Tax Receivers elsewhree state that there is no systematic, uniform system of taxing any kind of property at less than its true market value." And then in this immediate connection, goes on to say, "But the evidence not only warrants, but practically demands **the conclusion known of all men,** that if the estate of White be required to pay taxes on bonds and stocks of non-resident corporations at their true market value, this estate will be discriminated against **as compared with every other citizen of this County in like situations during the years for which taxes are sought,**

whether for current taxes or past taxes. Thus convinced, I am bound to grant protection against such discrimination." We would ask where is there any proof in this case to sustain this assertion as to discrimination? We think it was grounded solely on a "conclusion" and not in fact.

If the evil complained of was not caused by the law, or the tax officials, then we are at a loss to see wherein complainant has been denied any rights guaranteed to him under the Constitution. Indeed it is only the evil done by one of these that the Federal Constitution can protect.

In order to show illegal unconstitutional discrimination where the law is valid, it must be shown that "the officers who are appointed ,to make assessments **combine together** and **establish a rule or principal** of valuation, the necessary result of which is to tax one species of property higher than others."

German National Bank vs. Kimball, 103 U. S., 732, 26 L. E., page 469.

Florida Central R. R. Co. vs. Reynolds, 183 U. S., 746, 46 L. E., 283.

Wiona vs. Minnesota, 159 U. S., 526, 40 L. E., 247.

Weyerhaueser vs. Minnesota, 176 U. S., 550, 44 L. E., 586.

In the case of Florida Central R. R. Co., vs. Reynolds, supra, the court in discussing the failure of a lagislature to provide a method of collecting delinquent taxes upon property owned by individuals when it had provided a method for collecting delinquent taxes on railroad property, on page 287 L. E., said:

> "If the State, as has been seen, has the power, in the first instance, to classify property for taxation, it has the same right of classification as to property which in past years has escaped

taxation. We must assume that the legislature acts according to its judgment for the best interests of the state. A wrong intent cannot be imputed to it. **It may have found that the railroad delinquent tax was large,** and the **delinquent tax on other property was small, and not worth the trouble of special provision therefor."**

We submit that the same presumption might be indulged in favor of the tax officers.

Further on it was said on page 288 L. E.:

"If taxes are to be regarded as mere debts, then the effort of the state to collect **from one debtor is not prejudiced by its failure to make like effort to collect from another. And if regarded in the truer light as a contribution to the support of government, then it does not lie in the mouth of one called upon to make his contribution to complain that some other person has not been coerced into like contribution."**

If the evil complained of was caused by the tax payers of the State themselves, in not returning their property, one of whom was White whom has he to blame?

WHITE CAUSED WHATEVER DISCRIMINATION SHOWN, IF ANY.

The record discloses that White was a wilful tax defaulter, and if any discrimination was shown by the evidence the same was brought about by White, himself, by his failure to return his property during his lifetime, and therefore his Executor has no ground to complain.

"Executors and administrators do not own the property committed to them for administration, but hold it subject to the liabilities and burdens on it, including the liability for a tax imposed by the State and the penalties for nonpayment of the tax and whatever interest dis-

tributees or creditors may have therein, is subject to the same liabilities and burdens."

Bankers Trust Co., vs. Bridgett, 258 U. S., 67 L. E., 259.

It has been held that where a party fails to avail himself of a remedy provided by law in tax matters, he cannot resort to equity and contend that he is being deprived of his property without due process of law. As was said in the case of Graham Mfg. Co. vs. Travis, 274 Fed., 975, at page 981:

> "While, therefore, on the facts as stated, the tax both in respect of this and of the inclusion of the munitions business was erroneous, the plaintiff did not choose to avail itself of that process of law which was accorded to it, and therefore was not the victim of any unconstitutional action by the Commission."

Again, had plaintiff or his testator returned the property in question there would never have arisen the necessity for all the litigation through which this case has been, so whatever discrimination may appear, if any, no body is to blame, but the plaintiff's testator, and persisted in by plaintiff himself. This being true with what grace can he be looked upon by a court of equity? We assert that such a court will not allow him to take advantage of his own wrong.

The case of Greer vs. Ferguson, 104 Ga., 552, was where the Supreme Court of Georgia had under consideration the validity of an execution issued by the Comptroller General against wild lands wherein it was insisted that the same were void because they did not recite the various acts leading up to the issuance thereof and the Supreme Court held that it would presume that the Comptroller General did his duty in reference thereto, etc., and on page 556, speaking of the failure of the tax payer to return

the property when he had notice, that it had not been returned, said:

> "The proceedings required by this act were in the nature of an action against the land. The owner had notice of the proceedings, and if he had observed by returning the land and paying the taxes, the executions **could not have isued.**"

Furthermore, it appears in the record that White did make tax returns for the years in question but did not return the property which is the subject matter of this bill, although he owned it and knew it was his duty to return the same and pay taxes thereon. Had he done so, this case would not be in this court, so we submit that his Executor cannot persist in doing the same thing that White did—that is refuse to pay taxes on property admitted to be taxable and admitted to have never been taxed—and to this end enlist the aid of a court of equity to help him to do so, upon the theory that he is being discriminated against, when he himself brought the same about, if any exists, which is denied. His property has only been assessed as the Constitution requires.

In other words, as was said in Canadian R. Co. vs. Eggen, 252 U. S., at 561 64 L. E., page 716:

> "The discrimination of which he complains could arise only from his own neglect."

The case supra was where a statute of Minnesota declared that:

> "When a cause of action has arisen outside of this State, and, by the laws of the place where it arose, an action therein is barred by lapse of time no such action shall be maintained in this State unless the plaintiff be a citizen of the State who has owned the cause of action ever since it acrued."

The plaintiff therein, a citizen of North Dakota was injured in Canada. Under the laws of Canada the plaintiff's cause of action was barred after the lapse of one year. More than one year had elapsed before the filing of the suit in Minnesota. On the trial it was contended that the section above quoted was unconstitutional in that it denied to plaintiff, a citizen of another State, the equal protection of the laws of Minnesota, as under those laws, a resident would have six years in which to bring his suit and that this being so, he was being discriminated against, etc. In passing upon the question the United States Supreme Court, speaking through Mr. Justice Clark said on page 715, L. E:

> "It is only when the foreign limitation is shorter than that of Minnesota, and when the non-resident who owns the cause of action from the time when it arose has slept on his rights until it is barred in the foreign State, that inequality results, and for this we are asked to declare a statute unconstitutional. . . The discrimination of which he complains could arise only from his own neglect."

While it may be true that "the vigilant frequently meet with a larger degree of protection than they deserve" as was said in the case of Succession of Levy (Louisiana.. reported in 8 L. R. A. (N. S.) 1180, on page 1185 thereof, and if plaintiff's testator had been vigilant, he might have gotten off lighter, still, this is no reason why a court of equity should interfere by injunction where a man has refused to make a return of his property for taxation, upon the ground that he is being compelled to pay more than those tax payers who have been vigilant.

As was said in the case of Watson vs. State Comptroller, 254 U. S., 122, 65 L. E., 170.

"What classification could be more reasonable than to distinguish, in imposing an inheritance or transfer tax, between property which had, during the decedent's life, borne its fair share of the tax burden, and that which had not?"

So it is with the plaintiff in this case. Why should he not be required to pay more than those tax payers who have been "vigilent," those tax payers who did their duty and paid their just share of the burden of Government? It is submitted that he cannot now be heard to so complain in this court.

The plaintiff's testator did not return the property during his life though he knew he was legally bound to do so; neither did his executor do so for him; nor is it alleged that he sought the remedies provided for him by the statutes of Georgia and therefore he cannot be heard to complain.

See the case of Keokuk vs. Hamilton Bridge Co. vs. Salem, 258 U. S., 122, 66 L. E., 496, where it was held that where the invalidity complained of was only "discriminatory overvaluation" and the comulainant did not even apply to the Board of Review he could have applied to, the Supreme Court of the United States said:

"Here the alleged invalidity consists wholly in discriminatory overvaluation and, so far as appears appellant did not even apply to the Board of review to correct the assessment. There is then no basis for the contention that resort to a suit such as this was necesary to prevent either a sale for an illegal tax creating a cloud upon title, or multiplicity of suits to recover back the tax, or other irreparable injury."

Much less should one be allowed to resort to such a suit under the allegations of the bill in the present case. Here the complainant owns no real estate, the title of which can be clouded; he does

not allege that he will be subjected to a multiplicity of suits; and he discloses that he has persistently refused to resort to the only tribunal prescribed by the Laws of Georgia for his protection. Rather he resorts to a court of arbitration which has no jurisdiction and in this court seeks to have that illegal award declared legal when the Supreme Court of Georgia has held that the same was void by reason of the Act of 1918, and that that act prescribed for him a remedy if he wished to raise the question of excessiveness. This cannot be done. Coulter vs. L. & N. R. R. Co. 196 U. S., 598, 49 L. E., 615.

When the President of a Bank made a return for taxation of the Bank's stock ,which was not assessable under the laws to the Bank, and thereafter the Bank sought to enjoin the collection of such tax, the court refused the relief, and in its decision said:

> "But the action of the Bank and its President have caused all the trouble complained of."

Winfield Bank vs. Nip Treas. (Kans.) 28 Pac., 1015.

In the case of Marston vs. Elliott, 70 Southern, 519 (La. case) it was held that where a property owner failed to make a return of his property as required by law, he could not appeal to the courts for relief against an assessment—the court saying:

> "If plaintiff, by his action, permitted the door of relief to close upon him, he has no one to blame but himself."

And where a property owner made no return of his property, the court said:

> "Plaintiff made no return of property for assessment, and is therefore estopped by the Statute from contesting the correctness of the assessment list filed by the assessor." Beatrom Chrislom & Jenks vs. City of New Orleans, 59 Southern, 19.

Again, under a statute of Connecticut, where a a warehouseman failed to make a return as required by the Statute of property in its possession, it was held that it could not afterwards be heard to complain of the assessment put thereon by the assessor from the best information he had. Lincoln Transfer Co. vs. County Board of Equalizers (Neb.) 110 N. W., 724.

And the case of Pone Mob Mills, vs. Town of Libson (Conn.) 94 Atl., 919, it was held under a statute of Connecticut which required the assessors to act upon **"the best information they can obtain,"** where the taxpayer failed to make a return a defaulting taxpayer could not be heard to complain because they "misjudged the matter."

In People vs. Hibernian Banking Ass., 92 N. E., 305 (Ill.) on page 308, it was said:

> "The plaintiff in error had property which it was its duty to list. It did not do so and as required by the Statute the assessor assessed it acording to his judgment of the fair amount and value thereof. There is no claim that the assessment was fraudulent, that there was not a fair exercise of judgment, or that the valuation arrived at was not justified by the means of knowledge at hand. Plaintiff in error having failed to furnish the information necessary to a correct assessment the records of the probate Court could be availed of as well as such other sources of information as existed. The valuation of property is not, in the absence of fraud subject to the supervision of the courts. . . . Having failed to avail itself of the remedy provided by law for an overvaluation in the assessment it cannot now successfully resist the payment of the tax."

Section 1218 of Gray's Limitation of Taxation is as follows:

"There is no doubt that the legislature may make it the duty of the tax payer to hand in a list of his property at or before a specified time, and may provide that in the event of his failure to do so, the assessor may make the best assessment he can and the tax payer shall lose the right to a hearing on the amount of his assessment."

Citing Glidden vs. Harrington, 189 U. S., 255, 47 L. E., 798. That was a case where a trustee holding certain stock in a foreign corporation failed to list the same for taxation in pursuance of a notice under the Massachusetts law to do so, and the court in passing upon the same on page 808 L. E., said:

"Defendant did not choose to comply with that notice by submitting a list of the property held by him in trust, although he subsequently made application for abatement, upon which application a number of hearings were had. Upon his failure to make his return, these assessors did the only thing they could do: Ascertain as nearly as possible the particulars of the personal estate and estimate it at what they believed its just value. If defendant held personal property as trustee it was as much his duty to disclose it as if it had been individual property, and his contention now that he had no reason to anticipate that he would be taxed for property held in trust because he held none, is met by the fact that he applied for an abatement of this tax, and that after several hearings upon the case it was refused him."

Consequently it was held that there was no violation of the fourteenth amendment to the Contitution of the United States under such circumstances.

So it is submitted that in the case at bar, White having refused to return such property for taxation and his executor having done likewise, there was nothing in the language of the Supreme Court in

the case of Glidden vs. Harrington, supra, that the tax receiver could do but "ascertain as nearly as possible the particulars of the personal estate (of White) and estimate it at what they (he) believed its just value."

Not having done so, it is respectfully insisted that the complainant in this case is not in position to raise the isue of illegal unconstitutional discriination when the value of the property is not controverted and it is admitted that the same has been assessed only at its fair market value, **because such discrimination, of which complaint is made, was brought about only by the failure of White to make returns as the law required, and not having done so, his estate should be compeled to bear the consequences.**

It is submitted that none of the infirmities pointed out in the case of Central of Georgia R. R. Co. vs. Wright, 207 U. S., 127, 52 L. E., 134, in the Georgia law then under consideration can be found in the law of Georgia as it now stands. Indeed the present statutes of the State were enacted with that very decision in view.

No such contentions as were made in that case are being made in the present case. Here the Act of 1918 expressly provided notice and the tax payer has studiously shunned the State Laws' protection.

Again in the case supra there was a bona fide claim by the tax payer that the property which had been assessed was not taxable and it was intimated that the decision even there might have been different had the delinquent been "fradulently concealing his property," for on page 143 (L. E.), it was said:

"We must decide the case in view of its relations to a tax payer not fraduently concealing

his property, and honestly contending, with reasonable grounds for the contention, that it is not taxable under the laws of the State."

See Travelers Ins. Co. vs. Board of Assessors, 24 L. R. A. (N. S.) 388.

U. S. Fidelity & Guaranty Co. vs. Board of Assessors, 47 So., 442.

The tax payer in the instant case stands in quite a different light. Here the tax payer fraudulently "concealed his property" and has refused to resort to the laws of Georgia, passed with the above decision of the Supreme Court, in view; there the tax payer was not "fraudulently concealing his property" and had resorted to the Georgia Courts but had been denied the protection of the Fourteenth Amendment of the Constitution of the United States because those laws did not provide notice to the tax payer.

The contention of complainant in its last analysis is that because others may have escaped their share of the burden of taxation that he should be allowed to escape. We insist that such position cannot be maintained.

As was said by this court in the case of Florida Central R. R. vs. Reynolds, 183 U. S., 746, 26 L. E., 469, at page 288, L. E.:

"If taxes are to be regarded as mere debts then the effort of the State to collect **from one debtor is not prejudiced by its failure to make like effort to collect from another. And if regarded in the truer light as a contribution to the support of government, then it does not lie in the mouth of one called upon to make his contribution to complain that some other person has not been coerced into a like contribution."**

"A tax payer cannot protect himself against a legal and proper demand for his own taxes, by

alleging that another tax payer has been assessed for taxation in a way to render his taxes less than they ought to be under a proper administration of the law". Georgia Midland R. Co. vs. State, 89 Ga., 597.

To the same effect is the case of Burkhart vs. Fitzgerald, 137 Ga., 366, where the Georgia Court said:

"The mere fact that certain land within the City limits of Fitzgerald, owned by certain other persons, had been taxed, not ad valurom, but upon a valuation which was the difference between their value for agricultural purposes and as town lots, furnished no reason why the plaintiffs should not pay a tax on their property greater than the percentage of the values placed upon such agricultural lands for taxation.

As was said in the case of O'Neal vs. Virginia Etc., Bridge Co., 18 Md. 1, 79 Am. Dec., 669;

"Where provision is made for the relief of property owners against the improper exercise of the taxing power the law expects those concerned to be diligent in protecting their interests; and if they omit the opportunity, they cannot be relieved in equity, if at all, unless a strong case is presented, showing, among other things, that they have not been altogether in default in availing of the means provided by the tax law. And there must be something more than legal error assigned; it must present facts appealing to the conscience of the court, to prevent wrong and injustice."

Tested by this rule how does the plaintiff's testator stand.

Not only was there no need for Mr. White to be a tax defaulter but by section 1099 of the Code of Georgia, which has been in force in Georgia, for a long number of years, it is declared:

"It is tre privilege of any tax payer of the County where a return is made to complain to the receiver at any time before his digest is completed that any return is below the true value of the property, in which case he shall notify the person who made the return complained of, if practicable, verbaly or by writing giving him the name of complainant and the ground of complaint, and shall proceed to have a new assessment in the terms of the preceeding section."

The preceeding section provided for arbitration of the matter.

It might be insisted that no one would care to take such a step. This may be true, but that is no reason why he could not do so. Had plaintiff's testator set the proper example, he could very easily have afforded to do so for if the rich made a fair return the poor would be compelled to do likewise, he would have rendered the State a service.

However distasteful it may have been to complain of another's not returning his property, the law at least gave plaintiff's testator the opportunity to do so. Had **he done so he would have here saved all the discrimination of which he complains.**

GREEN CASES AND TAYLOR CASES DISTINGUISHED.

The Green Cases relied upon by appellee are quite different from the case at bar. In the first of those cases (Green) reported 244 U. S., 499-521, 61 L. E., 1280, it was admitted that other property in Kentucky was only assessed at 60% of its value whereas the State Board of Valuation assessed plaintiff's property at 75% , for on page 1283, L. E., the court said, "the allegations of the bills, not being denied, were taken as true, and final decrees were made granting relief against the enforcement of the dis-

puted assessment, and restraining the imposition of franchise taxes upon plaintiffs for the year 1915, **based on assessments** to their franchise at greater values than those **conceded** in the respective bills of complaint, which were 60 per cent of actual values."

In the second case decided at the same time, reported in 244 U. S., 522-554, 61 L. E., 1921, it was held that the evidence which established the same condition, was practically undisputed and a like judgment was entered, enjoining the excess above 60 per cent. And a like judgment was also entered in the case reported in 244 U. S., 555-6, 61 L. E., 1309.

In the second case the court distinguished the case of Coulter vs. Louisville & N. R. Co. 196 U. S., 599, 6608, 49 L. E., 615, wherein it was held that the evidence there submitted did not show that there had been an intentional systematic method of undervaluing property and in the Greene case it did, in this language: "A similar question of fact was involved in Coulter vs. Louisville & N. R. Co. and this court (p 609) held the evidence to be insufficient. In the present case besides much to the same effect as that presented in the Coulter Case, as mass of additional evidence was introduced, including extracts from the United States census reports for the year 1910, reports of the State Board of Equalization for the years 1910, 1911, 1912 and 1913, reports of the State Tax Commission of 1913; testimony of a member of the Board of Equalization who served in the years 1908 to 1911, inclusive; affidavits of nearly two hundred individuals from forty-seven counties in different parts of the State; and much besides. The evidence is too voluminous to be adequately reviewed within reasonable limits of space." All of which the Court said was practically undisputed.

There was no objection to such evidence it will be noted.

In the case of Taylor vs. Louisville & N. R. Co., 88 Fed., 350, the case decided by Judge Taft, the "uncontradicted" evidence there also proved a systematic and intentional assessment of property in the State at a certain percentage of its value. As witness the following language on page 362: "We find from the evidence, which is **uncontradicted,** that **generally in the State of Tennessee, for anumber of years, the assessors and the Board of equalization** of each **county have intended** to **assess** and **have assessed,** real and personal property at a **uniform percentage** less than its **real value."** Basing this finding upon some one hundred and fifty affidavits from some thirty-five counties and upon other facts in the record.

Neither was the evidence here objected to.

(4) Evidence offered by appellants, respondents below, wholly refuted any claim of complainant, appellee, of unconstitutional discrimination.

(a) That of Wm. A. Wright, Comptroller General of the State of Georgia, to the effect that he had general supervision of all the tax receivers of the state, and duly issued to them his yearly instructions, touching their duties, with reference to the collection of taxes, in which he impressed upon them that they should see that all persons owning personal property, such as stocks and bonds in foreign corporations, monies, notes and accounts, etc., as well as other property, should be required to return the same at its fair market value and tax the same accordingly; that he would not countenance the Tax Receivers alowing any tax payer to return property at any percentage of its value, and had no know-

ledge that such had been done, and that there had never been any concerted effort in the State to tax property in any other manner than at its fair market value.

(b) Evidence of H. J. Fulbright, State Commissioner to the effect that the laws of said State required all property in the State to be returned and taxed ad valorem, the value of which was arrived at, as a rule, by the return of the taxpayers under oath; that there was no uniform, systematic method among the taxing officials of the State of taxing property at any per cent of its value, but where property was returned at a certain valuation, the same was assessed at one hundred cents on the dollar; that while there may have been tax dodgers in the State—those who did not return their property at all and others who did not return their's at a fair valuation—that such practices were not inaugurated by the taxing officials of the State, nor were they encouraged by them; that it was impossible for the taxing officials to know, even approximately, the number of shares of stocks and bonds concealed and not returned for taxation, but where it was known, it was taxed; that there was no uniform, systematic practice of the tax officials of the State in allowing stocks and bonds, where they knew of their existence, to escape taxation, but after it was discovered, on the contrary, the same was taxed, as the law directs, at fair market value.

(c) Testimony of C. A. Steed, Tax Receiver of Richmond County, to the effect that he had not acted toward the Estate of said J. B. White, any differently than he would have acted toward any other estate upon like information; that he did no know of any property which had not been returned for

taxation; that where property was returned as being worth one amount, the same was assessed at such value, and not at any percentage thereof.

(d) M. C. B. Holley, Chairman of the Board of Commissioners of Roads and Revenues of Richmond County, testified to the effect that if his Board had the same information touching any other persons in Richmond County, as it had touching the Estate of J. B. White, it would act in the premises acordingly.

(e) The testimony of some ninety or a hundred tax receivers from all over the State to the effect that they had sought to carry out the instructions of the Comptroller General in assessing personal property, such as stocks and bonds in foreign corporations, at the fair market value, as far as it had been in their power to do so; that they had no personal knowledge of any such personal property, nor the owners thereof, which had been withheld from taxation, by such owners; that they knew of no uniform systematic rule in force in said State whereby the Tax Receiver had assessed such property at any percentage of its value, and to the best of their knowledge, such a system did not exist.

(f) Affidavit of Marcus S. Baker, Tax Receiver of Chatham County, to the same effect, and that he had recently collected in Chatham County, a large amount of taxes from the estates of decedents who had failed to make proper returns during their lives.

(5) It was incumbent on complainant in the court below, appellee herein, to allege with certainty, and prove by reasonable positive, credible evidence an intentional, arbitrary, uniform, systematic, unlawful discrimination.

Appellants say that this he wholly failed to do, and that his allegations of discrimination are vague and indefinite, and his proof equally so. There was no proof of any facts which showed any unconstitutional discrimination. No evidence was introduced by him, showing any **uniform,** systematic, arbitrary rule existing between the taxing officials of the State, whereby other property of like kind, as complainant's (such as had been assessed in this instance), had been assessed at any less percentage than its market value; nor was there any legal proof that the Tax Receiver of Richmond County had uniformly and systematically assessed other property of like kind in said County, at anything less than its market value. The **market value** of the property in question, which had been assessed, **was not disputed,** and there was no proof of the of the ownership of other property **of like kind owned by any other taxpayers, or its market value, on any of the taxable dates for either of the years in question, and which, was known to the tax officials of the State, or Richmond County, and that had not been assessed at all by them, or had been assessed at any precentage of true market value.** Giving complainant's evidence its fullest force, it merely tended to establish that there were tax defaulters in the State; that some, when returning their property for taxation, made false returns of its value; it **merely tended to show** that some tax payers thus may have escaped their just share of the burdens of Government, but such proof, when there was no attack on their tax returns, could not show unconstitutional discrimination against complainant, and is no defense to him when called upon to bear his just and legal taxes. And furthermore, appellants submit

that if complainant's evidence established the existence of **any rule existing between the tax payers of the State,** whereby they would not return their property at all, or where returning the same, would return it at less than its fair market value; there was no evidence whatever that such custom or such rule was the result of any agreement between the tax officials of the State, or instituted by them.

(6) Complainant by his bill would have been only entitled to enjoin excess beyond fifty per cent., had he proved discrimination.

As witness, the following language from paragraph 55 thereof, "That the Tax Receiver of said County, claims that neither, he, as Tax Receiver nor the County Board of Assessors, ever assessed any property at its full value but tried to assess real estate at 66 2-3 per cent. of its value, and money, notes and securities, where returned, at fifty per cent. of its value." And therefore, appellants say, that if the evidence established any discrimination, clearly it was palpably error for the lower court to grant any relief further than that contended for, and enjoin the executions in question for more than fifty per cent. of the value of the property.

It is submitted that the decision of the lower court should be reversed.

CROSS APPEAL.

We shall now briefly discuss the points presented by the cross appeal.

(1 and 2) Was State court decisions res adjudicata? Or the Act of 1918 unconstitutional?

It is respectfully submitted that they were not. The decision of the supreme court of Georgia appears in the record and it is submitted, that that court held that the Act of 1918 denied tax payers of

plaintiff's class the right of arbitration, and in effect held that such act was constitutional. For us to go to any extent in argument of the questions of res adjudicata, or the constitutionality of the Act of 1918, would be supererogation.

We therefore insist that the decision of the lower court on this line was eminently correct, and cite the folowing authorities in substantiation thereof:

Davidson vs. Board of Adm. of New Orleans, 96 U. S., 105, 24 L. E., 619.

Michigan R. R. Cases, 200 U. S., 245, 50 L. E., 744

King vs. Portland, 184 U. S., 61 L. E., 431.

District of Columbia vs. Bailie, 171 U. S., 161, 43 L. E., 118.

Boyle vs. Zacharie, 6 Peters, 348, 8 L. E., 423.

Chicago vs. Board of Supervision, 182 Fed., 291.

Union Pacific vs. Mason City, 199 U. S., 160, 50 L. E., 134.

Steed vs. Savage, 115 Ga., 97.
Kirkman vs. Gillespie, 112 Ga., 507.
Smith vs. Farrario, 105 Ga., 51.
Dix vs. Dix, 132 Ga., 632.
Satterfield vs. Speer, 112 Ga., 84.
Same vs. Same, 114 Ga., 127.
Insurance Co. vs. Atlanta, 151 Ga., 153.
Black on Judgment, Vol. 2, Sec. 710.
15 R. C. L., Sec. 320.
Seamster vs. Blackstock, 83 Va., 232, 2 S. E., 36.
Bigelow on Estoppel, page 64.
Whitesodes vs. U. S., 93 U. S., 247, 23 L. E., 882.
3 Cyc. 718.
John S. Clements vs. William Painter, 46 Ga., 487
7 R. C. L. page 1043.
7 R. C. L. page 1032.

Atlantic & Gulf R. R. Co. vs. Thomas Mann, 43 Ga., 200.

2 R. C. L. page 354.
Gordon, adm. vs. U. S., 7 Wal. 35, 19 L. E., 1.
Central of Ga. Ry. Co. vs. Gwyens, 112 S. E., 183.
Thornton vs. State, 5 App., 397.

The error committed was, after holding the State Court decisions were not res adjudicata, and that the Act of 1918 was constitutional and that that Act repealed the right of arbitration, in not dismissing the complaint and refusing the relief sought.

(3) Did the court err in allowing interest?

There was nothing to have prevented a payment of the amount paid on September 25, 1922, on September 2, 1919. Plaintiff would not do so without a receipt in full, and of course, under the circumstances the Tax Collector could not give that. If complainant should have paid it, then the State was entitled to the use of the money from that date. It was within the power of a court of equity to impose such a burden if it saw fit in the nature of a penalty, or as necesary to give complainant a right to complain in such court, regardless of any strict legal rule as to charging interest on interest. There are instances even where interest can be charged on interest, even at law. A man gives a note due two years after date, the interest thereon is represented by interest notes due every six months —he defaults in his payments—these interest notes after maturity bear interest. In other words they then become principal notes. So it might be said of the taxes due the State.

Respectfully submitted,

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FOR THE CONVENIENCE OF THE COURT WE HAVE PREPARED INDICES TO THIS BRIEF AS FOLLOWS:

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Supreme Court of the United States

OCTOBER TERM, 1924

No. 170

CHARLES S. BOHLER, TAX COLLECTOR OF RICHMOND COUNTY, GEORGIA, ET AL, APPELLANTS

vs.

E. H. CALLAWAY, AS EXECUTOR OF THE ESTATE OF J. B. WHITE, DECEASED, APPELLEE

No. 171

E. H. CALLAWAY, AS EXECUTOR OF THE ESTATE OF J. B. WHITE, DECEASED, APPELLANT

vs.

CHARLES S. BOHLER, TAX COLLECTOR OF RICHMOND COUNTY, GEORGIA, ET AL., APPELLEES

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF GEORGIA, NORTHEASTERN DIVISION.

BRIEF OF

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This is an appeal from a decree of the District Court of the United States, for the Southern District of Georgia, which enjoined certain tax executions issued by the tax collector of Richmond County, upon assessments made by the Tax Receiver for back taxes upon unreturned or omitted property, belonging to the Estate of J. B. White, late a resident of Richmond County, Georgia, upon the complaint of E. H. Callaway, Executor of said White. The injunction was sought upon several grounds, but in granting the same the lower court based its decree solely upon unlawful discrimination against White, although stating that there was not "sufficient evidence to justify a positive and exact conclusion", and thereupon based its decree upon the award of a board of arbitration which it had held to be void as had the State Supreme Court. (P. 196-9).

The record is somewhat lengthy, due to the fact that complainant filed a plea of *res adjudicata* in the court below, which covers 98 pages (Print Pg. 58-181). The issues however are simple. We shall first give a short *outline* of the case and will then set out the questions which we conceive are presented by the record for decision by this Court, after which, we shall set out a more detailed statement of the facts, and will follow that with citation of authorities and argument.

OUTLINE OF THE CASE

J. B. White, a resident of Richmond County, Georgia, died while traveling in Europe, at Genoa, Italy, March 31, 1917, leaving a will with E. H. Callaway of Augusta, Richmond, County, Georgia, as Executor, (Print 71) who probated the same in Richmond County, Georgia, both in common and solemn form. White was a *delinquent tax payer* for a period of more than seven years immediately preceding his death, and during said years, on the taxable dates thereof, owned the following stocks and bonds, which he failed and omitted to return for taxation, and upon which he never paid any taxes whatever—and upon which taxes are due to the State of Georgia, to wit:

Note—Italics Ours.

February 1, 1911	$1,012,366.67
January 31, 1912	1,397,691.67
January 31, 1913	1,344,405.83
January 1, 1914	1,555,695.83
January 1, 1915	1,443,500.83
January 1, 1916	1,508,436.00
January 1, 1917	1,375,408.50

Besides these stocks and bonds, White also owned additional assets—negotiable notes on each of said taxable dates aggregating some $12,000.00. He also owned on said taxable date for 1917, some additional stocks and bonds, aggregating $195,152.19. (Print pages 115-124).

Although owning all this taxable property, White wholly omitted to return the same. His personal property tax returns for each of said years, was for only $300.00 household and kitchen furniture, (Print 72). After White's death, during the administration of his estate, the State discovered that he was such large tax defaulter, and his executor on June 4, 1918, was given written notice by the State's proper taxing and assessing officer, as prescribed by the Statutes of Georgia, to make a *tax return* of said property for taxation for the years 1911 to 1917, both inclusive, (seven years being the period of limitation against the State in the collection of back taxes).—This his executor refused, but contended with such assessing officer that said property should not be assessed, and finally at the behest of said Callaway, Executor, said assessing officer, Steed, Tax Receiver, withdrew said notice of June 4, 1918, demanding said return, and did nothing more towards the assessing of said property. Subsequently in *December* 1918, Richmond County and the State filed a mandamus proceeding against said taxing officer, Steed, Receiver, in the superior court of Richmond County, seeking to compel him to do his duty and assess said property as the law required. Pending this mandamus proceeding, said taxing officer, on June 10, 1919, issued a *second* notice to said Callaway, demanding a return of such stocks and bonds for taxation for the years in question. With this notice, the said Callaway *also refused* to comply by not making

a return of the property demanded to be returned but deliberately refused to do so. (P. 4 Par. 13). He did return a small amount of other personal property but no part of such stocks and bonds—Continued in default. Upon such refusal the State produced to the Tax Receiver undisputed evidence of the fair market value and ownership by White of said property on the several taxable dates for the years 1911 to 1917, Steed, Tax Receiver, on July 28, 1919, and he proceeded to and did assess said stocks and bonds, etc., (see Richmond County vs. Callaway, 150 Ga., 232; Print page 25), as follows:

Year	*Amount*
1911	$1,000,866.87
1912	1,399,161.67
1913	1,558,300.83
1914	1,548,735.38
1915	1,439,160.83
1916	1,509,936.00
1917	1,623,567.52

(Certain National Bank stock and Southwestern Railroad Company stock, not intended to be included in such assessment, but intended to be deducted,—were so noted,—but through some mistake were not deducted in the total additions of said assessments. See Print record page 28).

At the time of the assessments, July 28, 1919, the Georgia Act of August 17, 1918, page 232, (quoted in full on page 19 hereof), was in force. This Act prescribed the Statutory remedy for a *delinquent tax payer* like complainant, who desired to question the excessiveness of assessments made against him, or who desired to question the taxability of the property assessesd—all to be made by petition in equity to the superior court of the county in which such assessments had been made.

To said mandamus proceedings brought against Steed, to compel the assessments of said property as above set out, the State and Richmond County sought to make Callaway, Executor of White, a party. This Callaway, Executor, resisted. This proceeding

was in the same Court to which the Act of 1918 had remitted him, as a delinquent tax payer if he desired to raise the questions of excessiveness, or non-taxability of said property. It was also the same Court to which the Acts of 1910, page 25, and 1908, page 27, hereinafter referred to, remanded delinquent tax payers, if they desired to raise the question of non-taxability of omitted property, which had been assessed. Here Callaway had the opportunity in December, 1918, to raise before the superior court in said mandamus proceeding, all questions which he subsequently raised March 22, 1922, by his bill in this case.

Prior to the passage of said Act of 1918, the remedy for questioning the excessiveness of a tax was *by arbitration* (Acts of 1910, page 27, and 1908, page 25, supra, both of which are quoted in full on pages 19, 22, 23 of this brief). *All of these Acts prescribed,* that if the *delinquent tax payer desired* to raise the question of *non-taxability* of his property, such question had to be raised by petition to the superior court,—the same court as is required by the Act of 1918. Such Act of 1918 having—so far as delinquent tax payers are concerned,—*repealed* only the arbitration remedy as it had previously existed under Acts of 1908 and 1910—and substituted therefor as the remedy for delinquents, petitions in equity to said Court. Under the Acts of 1910, all questions of excessiveness had to be *raised within twenty days from the date of said assessments,*—and *such provision* the Act of 1918 did not purport to *repeal* but left it in full force.

Complainant,—after receiving said notice of said assessments of July 28, 1919, pending said mandamus proceeding and effort to make him a party thereto—as stated—disregarded the remedy prescribed for him, and those of his class by the Act of 1918, and proceeded on August 7, 1919 to raise the question of excessiveness with said Steed,—*by demanding* within *twenty days* from July 28, 1919, *that Steed,* the assessing officer submit such assessments to a board of arbitration, (Record 79-82). This demand was made more than a year after the passage of the Act of 1918, which had repealed this remedy by arbitration. Steed, Tax Receiver, acceded to such demand of Callaway, Executor.—An ar-

bitration board was thereupon organized by them,—Steed and Callaway. This arbitration board reduced the assessments made by Steed for said years to *about* 10 *per cent* of the admitted value of said stocks and bonds, as follows: (Print page 209),

Year 1911	Amount	$112,744.83
Year 1912	Amount	154,550.67
Year 1913	Amount	187,927.98
Year 1914	Amount	194,138.96
Year 1915	Amount	190,202.74
Year 1916	Amount	301,183.67
Year 1917	Amount	360,813.92

The arbitration board thus organized, arbitrarily reduced the taxes to which the State was entitled for the years in question, from some $200,143.60 to $27,980.88 including interest (Print 210.)

As a result of this action on the part of said Tax Receiver and said Executor in organizing said so-called Board of Arbitration, sundry litigation ensued in the State Court, in which the State sought, *first*, to enjoin the holding of the arbitration demanded by Callaway, Executor, (See State vs. Callaway, 150 Ga., 235); and *second*, to set aside said award as returned by said board of arbitration, (State vs. Callaway, 152 Ga., 871). Among other things the Supreme Court of Georgia, in the last case said:

> "The assessment of the property for taxation, involved in this case, having been made in July, 1919, and the arbitration proceedings as to such assessments having been had in September of that year, the above-quoted provisions of the Act of 1918 provided the remedy, that is, by petition in equity, by the dissatisfied tax payer, for having such assessments corrected because excessive. The procedure for arbitration of tax assessments claimed by delinquents to be excessive, in force prior to the enactment of the Act of 1918, are by it repealed. It follows, therefore, that the arbitration proceedings for the assessment of property for taxation here involved, and the award made by the arbitrators, were wholly void.....".

Under the law of Georgia no public officer can bind the State by any agreement of any kind, unless expressly so authorized by Statute, nor could he by his conduct estop the State (Civil Code 1910, Sec. 303; Booth vs. State 131 Ga., 750), State vs. Southwestern Railway Company, 66 Ga., 403), nor grant exemptions form taxation in any form (Civil Code 1910, Sec. 6462). All this litigation was in the said Superior Court, to which Court the Act of 1918, page 232, had remanded a delinquent tax payer for relief, if he desired to raise the questions of excessiveness or non-taxability. In all of these proceedings Callaway, Executor, had the opportunity to raise all the questions he desired to raise and now raises as to the assessments on said property.

After the rendition of said State decision,—practically three years after the assessments in question had been made,—Callaway, Executor, without ever having taken advantage of *the opportunities afforded him* to raise any or all of the questions now at issue in the several stages of the case in the State Courts, and without having ever availed himself of the State statutory remedy as prescribed by the Act of 1918 and without reviewing said decision of the Supreme Court of Ga. in the United States Supreme Court, filed this bill in equity on March 23, 1922, in the District Court of the United States for the Southern District of Georgia, praying that this Federal Court would by its decree fix the assessments on the *unreturned* property of White at the amount fixed by said Board of Arbitrators and that (P 20) the executions issued upon said assessments as made by Steed, Tax Receiver on July 28, 1919 be enjoined. He complained that the State had arbitrarily denied him constitutional rights—both through its laws, and the acts of its officers, all without ever permitting those questions to be submitted to the tribunals created by the State laws therefor.

There were certain allegations as to the alienage of White and as to the amount due by White to Clews & Co. of New York and the possession of said property by Clews & Co., etc., but no relief was sought on such grounds; the taxability and situs of the property were not controverted, but the complaint was that as said Board of arbitration had reviewed Steed's assessments,

which had been the subject matter of the litigation referred to, this had finally and conclusively fixed the amount of taxes that he, complainant, should pay upon the property in question—a sum much less than said tax executions—; also that the record of said State Court litigation shows that the questions at issue were *res adjudicata*, although the question of arbitrary and illegal discrimination had never been raised before the Court. Complainant further insisted that if the Act of 1918 should be held to have repealed the right of arbitration to defaulting tax payers, as it had previously existed in Georgia, that so far as he, complainant, and those in his class were concerned, the same was retroactive and unconstitutional; that said Act of 1918, was discriminatory in that it reserved to *tax payers other than delinquents*, the right of arbitration and denied such right to delinquents—those of complainant's class—and placed upon him and others of such class—burdens not placed upon certain other classes af tax payers, who made returns as required by law, etc., such as the necessity of litigation in the Courts, etc., while it preserved to such other certain classes of tax payers the right of arbitration. No attack was made as to the constitutionality of the provision of the Act of 1918, as to the remeedies prescribed thereby, as to how a delinquent tax payer should question the taxability of his property,—nor was any attack made upon the Acts of 1910 or the Acts of 1908, which contained the same provisions. There were cert. in allegations in this bill as to the inclusion in the assessments of sundry National Bank stock and Southwestern Railroad Company stock, and on this ground complainant also contended that the executions should be enjoined. (It appears from the record that the inclusion of these stocks was unintentional. See Print 28-29, and 239). Complainant in his bill raised both the question of excessiveness, and of non-taxability, (National Bank stock and Southwestern R. R. Co. stock) whereas he had never before raised the latter. Complainant also contended that if the assessments were allowed to stand, the same would be discriminatory against him and in violation of the Fourteenth Amendment to the Constitution of the United States, because as he alleged *on information and belief, that* not more than 10 percent. of

stocks and bonds, as were owned by the various tax payers throughout Georgia, had been returned for taxation by them (P. 17, Par. 51), that it was a common practice for tax payers not to return such property, there was no allegation of who owned such property, what was the amount thereof, nor whether the same was owned on any of the taxable dates for any of the years in question, or that the tax officials knew thereof, knew who owned the same, the value thereof on the taxable dates, and deliberately refused to assess the same, or assessed the same at any percentage of its value. Complainant claimed, that he was assessed at full market value, and that because the tax officers had not sought to assess the property of others (P 18, Par. 55) it was discrimination to insist upon assessment of the property owned by the Complainant's testator for the years in question; that the assessing officer of Richmond County claimed that stocks and bonds were never assessed at more than 50 per cent. of their value in said County.

Respondents filed a motion to dismiss in the nature of a demurrer upon various grounds among them being that the bill contained no equity; that complainant had not exhausted his State statutory remedies; that he was too late in raising the issues he did; that he had failed to do equity by not *paying before* suit the *amount* of *taxes he admitted* to be due; that he did not come in under any head of equity jurisdiction, such as the ownership of real estate, title to which could be clouded by the tax executions; that it appeared that *White was a tax defaulter* and had, himself, brought about whatever discrimination he claimed existed; that a Federal Court had no appellate jurisdiction to review or establish a State Supreme Court decision, etc., and that the releif sought should be denied; and his bill dismissed.

Respondents also filed a response—verified answer—in which they set out in detail how the tax laws of Georgia were administered, and in which they controverted all allegations of illegal, unconstitutional discrimination asserted by complainant, and avered that he was trying to evade his just taxes on the property he illegally withheld from taxation.

The case then came on for a final hearing on September 25, 1922.

OUTLINE OF EVIDENCE

Briefly stated, Complainant introduced in evidence the following:

Copies of the executions and assessments, (Print page 21-29); copy of the demand for arbitration and the arbitration proceedings (Print page 29); copies of the State records with all entries and ehibits, which appear as exhibits "I" and "J", pages 85-181 of the printed record. He also introduced separately the evidence offered the arbitrators,—which is attached to said record as exhibits. This evidence consisted of the testimony of J. B. Clews, (Print 142) to the effect that White owned said property during said years; Also certain extracts from the Comptroller General's reports giving the amount of property which appeared to have been returned for taxation throughout the State (Print 11-12) etc.; An affidavit of J. B. Clews (Print 144), giving the amount of indebtedness due his firm by White, but which had been paid before any assessment for taxation had been made on said property; Affidavit of John W. Dickey (Print 145), giving his *opinion* of the amount of stocks and bonds which he estimated was owned by the people of Richmond County; An affidavit of Rufus H. Brown, (Print 147), giving the amount of money on deposit in the Banks of Augusta in the years 1916, 1917, and 1918; Also an affidavit of Callaway, Executor (Print 148), giving the amount of uncancelled security deeds in the nature of mortgages, he found of record in the Clerk's Office for the years 1910, 1912, 1913, 1914 and 1915; A joint affidavit of Bussey & Howard (Print 149), of like import; Copy of an inventory of the Estate of William E. Benson, (Print 150), which showed that the said William E. Benson owned some $90,000.00 at the date of his death; Another affidavit of Callaway, executor, (Print 152), giving the result of his examination of certain inventories in the Ordinary's office which showed the amount of property owned by decendants at the dates of their death; Also certain testimony of Steed, Tax Receiver, (Print 153), introduced before the Board

of Arbitrators, wherein he stated, that he had been tax receiver for a number of years, that there was a rule not to assess for full market value, that in starting out where no arbitration was demanded, he would make the assessments at full market value, but if arbitration ensued, he would settle on some lesser basis than the full market value, that the Board of assessors never go over two-thirds valuation on stocks and bonds; *on cross-examination he testified however,* that if a tax payer stated he owned property worth a million dollars he would not assess the same at $200,000, that if one made a return of a million dollars, he was assessed at a million dollars, (Print 201-2); Also another affidavit of Callaway, Executor (Print 203-19), wherein he gave a general resume of the entire petition an dthe various acts leading up to the assessments in question; A report of Fulbright, State Tax Commissioner for the year 1920, (Print 212), in which he set out the percentage at which *he estimated country real* estate was returned throughout the State, which he said ranged anywhere from 60 per cent. to 27 per cent. Another affidavit of Callaway, Executor, (Print 216), stating certain facts with reference to his examination of certain estates as appeared in the office of the Ordinary, as to amount of property owned by the several parties at the date of their death; An address of H. J. Fulbright, dated *January* 1, 1919, (Print 217), giving *his estimate* of the value at which property in the State had been returned for taxation as being 32 per cent. He then introduced in evidence abstracts of inventories of some eighteen estates (Print 218, etc.), showing amount of propeerty said several parties owned on the date of their deaths during the years in question; Also an affidavit of Verdery, (Print 221), one of the members of the Board of Tax Equalizers of Richmond County,*for* 1918, stating how the assessment against Callaway, Executor of White on the stocks and bonds was made for the year 1918 at $250,000.00; A similar affidavit of H. K. Lowery, another one of the members of said Board of Equalizers *for said year* 1918. An affidavit of H. R. DeJarnette, (Print 222), that he was a member of the Tax Commission appointed by the Governor in the year 1918, and made a report on the first of June, 1919, giving his estimate of what he

considered was the percentage of stocks and bonds, as owned by the tax payers throughout the State, that had been returned, according to the report of the Comptroller General, which, in *his opinion* did not show more than 10 per cent.; Also three affidavits from three different tax payers from thirteen counties out of the 160 counties of the State (Print page 223, etc.), stating that in *their opinion*, as they figured from the amounts shown by the Comptroller General's reports, that such amounts did not represent more than 10 per cent. of the amount of stocks and bonds as were owned by the various tax payers throughout the State. He also introduced in evidence, the assessment made by the Board of Equalizers of Richmond County, for the year 1918, referred to in the affidavits of Verdery and Lowery.

Respondents objected to each and all of this testimony as it was severally offered in evidence by complainant upon various grounds,—among them being that the same was irrelevent and inadmissible; that it did not prove nor tend to prove any arbitrary action by the taxing officers—nor any systematic, unconstitutional discrimination, etc.—These objections were overuled and will be set out more in detail hereafter.

In reply respondents introduced evidence *denying*, and *refuting all* the alleged *claims* of *discrimination* as made by complainant, which briefly stated, was as follows:

The assessments in question (Print 25 etc.); The written assent of Callaway, Executor, conveying all the real estate of White to his legatees (Print 40); Depositions of Clews, (Print 241), showing the ownership of said property by White; Affidavit of McPherson and Dugal, (Print 114), valuation experts giving the market value of said property on the several taxable dates, for 1911-1917. (This was the evidence of value on which Steed acted in making the assessments); Evidence of Tax Receiver of Chatham County, Savannah, Ga. denying that there was any systematic rule in force in Georgia for assessing stocks and bonds at any percentage of their value, that wherever the ownership of such came to his knowledge the same was assessed

the same as other property (Print 242); Evidence of C. A. Steed, Tax Receiver, of Richmond County, to the effect that he had not discriminated against the Estate of White, but had treated it in the same manner as he would treat any other estate, or tax payer, with like information before him; that there was *no systematic rule existing in Richmond County whereby stocks and bonds were not returned, or where returned were returned or assessed at any percentage of its value; that where one made a return to him of property as being worth* $10,000.00, *he assessed it at that figure* (Print 242); Evidence of M. C. B. Holley, Chairman of the Board of Commissioners of Roads and Revenues of Richmond County, *denying* that his Board had *discriminated against* the Estate of *White*, and stating that *with like information before it, it would act in the same manner towards any other person or estate as it did against the estate of White*, (Print 244); Evidence of Benjamin E. Pierce, (Print 244), *denying discrimination* charged; Evidence of the State Comptroller General of taxes, (Print 245) to the effect that he had been such Comptroller General of taxes for more than thirty years, and *had always insisted on all property of the State being assessed at its fair market value;* that he had *issued yearly instructions* to the various tax receivers, *impressing* upon them the *duty of assessing stocks and bonds at fair market value;* Extracts from the reports of said Comptroller General (Print 245), for said years in question,

> *"Shares of stock of all non-resident corporations owned by citizens of this State, whether held in or outside of the State, are by the Constitution of this State made subject to State and County taxation, and you are instrusted to require them returned to you for taxation. Should the owners of any such stocks, fail or refuse to make return of them, claiming that they are not subject to taxation, your duty is to assess them and place them on the digest of your County.....Upon you devolves the important duty of seeing that each and every tax payer returns his property on the same basis for the purpose of being taxed thereon, and that basis is the one fixed by law, i. e. at its true and full market value. There exists many difficulties which will meet you in the attempt to make parties return their property on this basis, but your duty is plain,*

and you can in a great degree, with the assistance of your grand jury, correct this evil.....Read and study this law carefully and see to it that every eax payer is required to return his property as the law requires."

(The same language was included in each book of instructions for each of said years in question). Also evidence of Fulbright, State Tax Commisioner, (Print 246), to the effect that he was familiar with the taxing laws of Georgia; *that there was no uniform method* existing in said State *whereby the tax payers were encouraged* by the tax officials *not to return stocks and bonds for taxation,* that where *such property was known to exist and who the owners were,* the *same was assessed as other property, at fair market value; that the rate of taxation throughout the State was uniform* and *applied to all property alike,* that if the tax payers of the State did not return such property the tax officials could not tell who owned such property, or who did not own the same, *but where it was known to exist it was assessed at fair market value, as all other property;* Also evidence of some *eighty-five Tax Receivers* throughout the State (Print 247, etc.), *in which they severally denied that there was any uniform, systematic, rule in force in said State, whereby stocks and bonds were assessed at any percentage of their value; that where it was known to exist, it was assessed as all other property, at fair market value, so far as it lay in their power to do so, etc. That they knew of no property not assessed.*

OUTLINE OF DECREE

The lower court retained jurisdiction of the cause upon the ground, that there had been included in said assessments certain National Bank stock, (amounting to some $60,000.00), along with the million and a quarter or more dollars of other taxable stocks and bonds that had been assessed. (It was stipulated that the taxes on this might be abated for the reason that the same had not been intentionally assessed by Steed, but inadvertently included in adding up the totals of his assessments through mistake, when he intended to omit the same, Print 239).—The Court then ruled against the contention of complainant, held the *arbitration*

he relied upon was void, denied his plea of res adjudicata, in the following language: *"None* of the *decisions* of the *Courts* of *Georgia* are *conclusive as res adjudicata,* in establishing the validity of the award." (Print 196)—held that the Act af 1918 *repealed any right of arbitration* as previously existed, so far as *delinquent tax payers* of complainant's class were concerned; ruled against complainant's contention that said *Acts of* 1918 was *unconstitutional* and *held* that the same *was* constitutional and *prescribed due process* of *law* for the *collection of back taxes from defaulters on unreturned property;* that *under such Act the State Courts upon complaint would enjoin excessive assessments,*— we quote in part the language of the decree—

> "Due process is provided by the Act of 1918, because opportunity is afforded to be heard as to *excessiveness* of the tax or its legality.....The Act of 1918 does not contemplate that a court of equity shall assess for taxation (as had been contended). The issue for it to determine is: Is the assessment excessive; and, if so, to what extent? It would enjoin only what is excessive and leave standing the assessment already made as thus modified." (Print 196).

The Court however, enjoined all of said tax executions over and above an amount fixed by said Board of Arbitration *notwithstanding* the Court *held said award to be void.* The decree on this point being as follows:

> "Had the estate af White already paid such an amount that the enforcement of any additional amount would be a *discrimination? This can not be answered with confidence. There is not sufficient evidence to justify a positive and exact conclusion.* The only tribunal that has attempted to reach such conclusion is the Board of Arbitrators, *whose authority in the premises has been denied, but whose investigation and conclusion can nevertheless be properly used as an aid*".....*"* (Print page 198-99.)

Notwithstanding the court had held the award to be illegal and void, it followed the same and enjoined the tax executions for all in excess of the *amount* of the *award,* as, pending the hearing,

complainant had paid this amount. The Court, however, *required* complainant to *pay interest from the date of the award,* which he had not done.

From such decree, this appeal was entered.

From the foregoing brief outline of the case, it will be seen that the questions presented for the consideration of this court are as follows:

1. DID THE COURT ERR IN OVERRULING RESPONDENTS MOTION TO DISMISS IN TH NATURE OF A DEMURRER?

An answer to this question will require a consideration of the following several legal propositions:

(a) Complainant having failed to avail himself of the opportunities afforded him to raise the issues, he now raises, in the State Court, litigation; and having failed to exhaust his statutory remedy as prescribed by the Act of 1918, page 232, of the General Assembly of Georgia, his bill was without equity.

(b) Complainant had no title to real property which could be clouded by the tax executions; no multiplicity of suits was alleged, nor did he allege any facts which showed irreparable injury.

(c) Complainant failed to do that equity which would entitle him to be heard, by first paying the amount he admitted he was liable for.

(d) The inclusion of the National Bank stock along with the million or more dollars worth of other taxable property did not authorize the court to retain jurisdiction of this cause, and enjoin the tax fi fas in question.

(e) A Federal District Court has no jurisdiction to review or adjudge the validity or invalidity of the State Courrt decision in relation to the arbitration proceedings as prayed by complainant.

2. DID THE COURT ERR IN ADMITTING COMPLAINANT'S EVIDENCE OVER THE OBJECTIONS URGED THERETO?

An answer to this question will necessitate a consideration of the following legal propositions:

(a) Complainant failed to do that equity which would have entitled him to be heard, and not having done so, none of said evidence should have been received.

(b) Record of suits from the State Courts involving arbitration proceedings and the award of such arbitration board being void were inadmissible.

(c) C. A. Steed. Tax Receiver, was incompetent to impeach his official acts by testifying to any violation of his oath of office with reference to the method of making any previous assessments.

(d) The various other assignments of error on the admissibility of testimony offered by complainant in the lower court, will be discussed in the order in which they appear in the assignments of error.

(e) The court erred in not excluding complainant's evidence on motion made because the same did not show any discrimination.

3. IF THE COURT WAS CORRECT IN OVERRULING RESPONDENTS MOTION TO DISMISS, AND IN OVERRULING THE OBJECTIONS TO COMPLAINANT'S EVIDENCE, DID IT NOT ERR IN ENJOINING THE EXECUTIONS UPON THE GROUND OF UNCONSTITUTIONAL DISCRIMINATION IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

This question presents for consideration the following several legal propositions:

(a) Burden of proof was upon complainant to prove his allegation of arbitrary discrimination with certainty, which he failed to carry.

(b) Rule of evidence, as laid down by this court, to prove discrimination was not met.

(c) White was a wilful tax defaulter, and if any discrimination was shown, he and his executor brought it about, and his executor has no cause for complaint.

(d) Evidence of respondents, appellees, wholly refuted any claim of discrimination.

(e) Complainant's evidence, given its fullest weight, merely tended to show that possibly some tax payers had been successful in dodging their just share of the burden of taxation; but it did not prove that the tax officials were responsible therefor, and even though some may have escaped, this would not afford complainant any protection when called upon to pay his just taxes; yet, this is in effect his contention.

(f) When the award of the illegal board of arbitration is laid aside, complainant, only contended, that other property, like that which had been assessed against him, was assessed at 50 per cent. of its value by the tax officials of Richmond County. If he had conclusively proved such contention, this was the utmost relief to which he was entitled, yet, the lower court, by its ruling gave him practically 40 *per cent more exemption* than he contended for, *which was palpably error.*

The sub-heads under which we shall discuss the foregoing questions, state the principles of law upon which appellants rely for a reversal of the decree of the lower court.

* We shall now give a more detailed statement of the facts, and will then follow with citation of authorities and argument.

DETAILED STATEMENT OF FACTS

J. B. White, died, domiciled in Richmond County, Georgia, while traveling in Europe at Genoa, Italy (P 71), on the 31st day

* *Law and Argument P. 69 infra.*

of March, 1917, leaving a will, in which he named E. H. Callaway, Executor. In due course said Executor probated said will in Richmond County, both in common and solemn form. From such proceedings it appeared that White owned some $1,500,000.00 of stocks and bonds in foreign corporations which were taxable in Richmond County, Georgia. The taxing authorities thus learned of the very large estate left by White; and that White had failed to make a return of any of such stocks and bonds during his lifetime; that his tax returns for seven years immediately preceding his death (this being as far back as the State could reach in the collection of taxes on omitted property) were for only $300.00 *of household* and kitchen furniture under the head of personal property, and nothing whatsoever under the head of stocks and bonds, whereupon the Taxing Authorities through the Tax Receiver, the State's proper assessing officer, demanded a return of such omitted property for taxation by said Callaway, as Executor of White, for said years, (P 4). Such Tax Receiver on June 4th, 1918, issued the statutory notice to said Callaway, as Executor of White, demanding a return of said property for the purpose of taxation for the years 1911 to 1917, both inclusive, attaching to his notice a list of the securities claimed to be subject to taxation.

Callaway, Executor, refused to make a return of such property in compliance with such demand and on the contrary contended with the tax receiver to such an extent that he Callaway, Executor, prevailed upon the tax receiver to withdraw such notice of June 4th, 1918. On July 31, 1918, the Legislature of Georgia passed an Act (Georgia Laws, 1918, page 232), which act is as follows:

> "An Act to provide for the collection of taxes due to the State, Counties and municipalities and schools thereof, and for other purposes.

Section 1. Be it enacted by the General Assembly of the State of Georgia, and it is hereby enacted by authority of the same, That when the owner of property has amitted to return the same for taxation at the time and for the years the return should have been made,*or having returned his property or part of same, has grossly under-valued the property returned, or his property has been assessed for taxation at a figure grossly below its true value, such owner, or, if dead, his personal representative or representatives, is required to return such property for taxation for each year he is delinquent, whether delinquency results from failure to return or from gross undervaluation, either by the delinquent or by assessors, said return to be made under the same laws, rules and regulations as existed during the year of said default, or said property was returned or assessed for taxation at figures grossly below its true value. Provided, that no lien for such taxes shall be enforced against any specific property which has been previously alienated or encumbered, and it is in the hands of innocent holders without notice.*

"Section 2. Be it further enacted, That when the owner of said property, *or, if dead, his personal representative or representatives* refuses or fails to make returns in cases of property which should have been returned to the Comptroller-General, the said Comptroller General shall notify in writing, such owner *or his personal representative or representative* of his delinquency, demanding that a return shall be made thereof within twenty days.

Section 3. Be it further enacted, That when such property is of that class which should be returned to the tax receiver of the county, the said tax receiver shall notify in writing such delinquent,*or, if dead, his personal representatives,* of such delinquency, requiring that a return shall be made thereof within twenty days.

Section 4. Be it further enacted, That if the delinquent *or his personal representative or representatives,* as provided for in Section 2 of this Act, refuses or fails to return such property after the notice given, or returns it below what the Comptroller-General deems its value, it shall then be the duty of the Comptroller-General to assess such property for taxation for State, county or municipal and school purposes, from the best information he can obtain

as to its value, for each year in default, and notify such delinquent *or his personal representative or representatives* of the valuation, which valuation shall be final, *unless the person or persons so notified* raise the question that it is excessive, in which event the further procedure shall be as provided by Section 1045 of the Code of 1910.

Section 5. Be if further enacted, That if the delinquent *or his personal representative or representatives*, as provided under Section 3 of this Act, refuses or fails to return such property after notice given him, it shall be the duty of the tax receiver to assess such property for taxation from the best information he can obtain as to its value for the years in default, and notify such delinquent of the valuation, which shall be final, unless the *person or persons so notified* raise the question that it is excessive, in which event *the further procedure shall be by petition in equity in the Superior Court of the County where such property is assessed.*

Section 6. Be it further enacted, That if the delinquent under Section 2, disputes the taxibility of such property, he may raise the question by petition in equity, in the Superior Court of Fulton County, and if such delinquent be dead, his personal representative or representatives shall have the same right.

Section 7. Be it further enacted, That if the delinquent *or his personal representative or representatives*, under Section 3, disputes the taxibility of such property, he may raise that question by petition in equity in the Superior Court of the County where said property is assessed.

Section 8. Be it further enacted, That all laws and parts of laws in conflict with this Act be and the same are hereby repealed.

Approved July 31, 1918."

*Italics indicate changes in old law.

In order that the Court might observe just what changes have been made in the several Acts of the Legislature of Georgia, since the decision of this court in the case of Central of Georgia R. R. Co. vs. Wright, 207 U. S., 127, 52 L. E.,134, wherein it held that the law as it then existed did not prescribe due process, we shall

copy, first next the Act of 1910, page 25, which amended the Act of 1908, page 27, that was passed shortly after the rendition of said above decision; and then we shall copy said Act of 1908, page 25. We shall indicate by italics the changes.

Act of 1910, page 27:

"An Act to amend an Act entitled an Act providing for collection of past due taxes to the State, counties and municipalities thereof, and for other purposes, so as to provide for amending the caption, to provide for the correct method of assessing and collecting past due taxes for school purposes, and for municipal purposes, in case where returns should have been made to the municipal authorities and for other purposes.

"Section 1. Be it enacted by the General Assembly of the State of Georgia, and it is hereby enacted by authority of the same, That the caption of the Act entitled an Act providing for the collection of past due taxes to the State, Counties and municipalities thereof, and for other purposes, approved August 15, 1908, be, and the same is hereby amended by adding after word *"thereof"* in the second line of said caption the following, to wit: *"and to the county Boards of Education or other school authorities authorized to levy taxes for school purposes,"* so that said caption when thus amended shall read as follows: "An Act providing for the collection of past due taxes to the State, counties and municipalities thereof, and to the County Boards of Education or other school authorities authorized to levy taxes for school purposes, and for other purposes."

"Sec. 2. Be it further inacted, That said Act shall be and is hereby amended by adding at the end of Section 5 of said Act the following words, to wit: *And said assessment when completed and entered upon the tax digests, shall be adopted and used by the county Boards of Education or other school authorities authorized by law to levy taxes for school purposes in counties or school districts in lieu of requiring separate returns or arbitrations for purposes of school taxation, provided that the tax payer should he desire to contest the taxibility of his property for school purposes, may raise that question by petition in equity in the Superior Court of the County where said property is assessed.*

"Sec. 3. Be it further enacted, That said Act shall be and is hereby amended by inserting after Section 7 of said Act and just before the repealing clause, the following provisions to be known as Sections 8, 9, and 10, and by numbering the repealing clause as Section 11 instead of Section 8 of said Act, to wit:

"Sec. 8. *Be it further enacted, That when the omitted property is of the class which should have been returned to the tax receiver of a municipality by what ever name called, said tax receiver shall notify in writing such delinquent, demanding that a return be made thereof within twenty days.*

"Sec. 9. *Be it further enacted, That if the delinquent as provided for in the above Section refuses to return his property after notice given him, it shall be the duty of the tax receiver or assessor of the city as the case may be, to assess such property for taxation from the best information he or they can obtain as to its value for the years in default and give written notice thereof to the tax payer, which assessment shall be final unless the tax payer within twenty days after receiving such notice raise the qusetion that it is excessive, in which event the question of valuation shall be referred to arbitrators, one to be chosen by the tax payer and one by the assessing officer of the municipality, with power to choose an umpire in case of disagreement, and their award shall be final.*

"Sec. 10. *Be it further enacted, That if the delinquent under Sections 8 and 9 disputes the taxibility of such property, he may raise that question by petition in equity in the Superior Court of the county where said property is assessed.*

"Sec. 11. Be it further enacted, That all laws and parts of laws in conflict with this Act be, and the same are, hereby repealed.

Approved August 13, 1910".

ACT 1908 (page 25)

An Act providing for the collection of past due taxes to the State, counties and municipalities thereof, and for other purposes.

"Section 1. Be it enacted by the General Assembly of the State of Georgia, and it is hereby enacted by authority of the same, That when the owner of property has omitted to return the same for taxation at the time and for the years the return should have been made, such owner is now required to do so for each year he is a delinquent, said return to be made under the same laws, rules and regulations as existed during the year in default.

"Sec. 2. Be it further enacted, That when the owner of said property refuses or fails to make the return in case of property which should have been returned to the comptroller-general, the said comptrolle-general shall notify in writing such owner of his delinquency, demanding that a return be made thereof within twenty days.

"Sec. 3. Be it further enacted, That when the omitted property is of that class which should have been returned to the tax receiver of the county, the said tax receiver shall notify in writing such delinquent requiring that he shall make a return thereof within twenty days.

"Sec. 4. Be it further enacted, That if the delinquent as provided for under Section 2 of this Act refuses or fails to return his property after the notice given, or returns it below what the comptrolle-general deems its value it shall then be the duty of the comptroller-general to assess such property for taxation for State, county and municipal and school purposes from the best information he can obtain as to its value for each year in default and notify such delinquent of the valuation, which valuation shall be final unless the tax payer raises the question that it is excessive, in which event the further procedure shall be the same as is now provided when the value of returned property is arbitrated.

"Sec. 5. Be it further enacted, That if the delinquent as provided under Section 3 of this Act, refuses to return his property after notice given it shall be the duty of the tax receiver to assess such property for taxation from the best information he can obtain as to its value for the years in default and notify such delinquent of the valuation, which shall be final, unless the tax payer raises the question that it is excessive, in which event the further procedure shall be the same as provided by law when the value of returned property is arbitrated.

"Sec. 6. Be it further enacted, That if the delinquent under Section 2 disputes the taxibility of such property he may raise that question by petition in equity in the Superior Court of Fulton County.

"Sec. 7. Be it further enacted, That if the delinquent under Section 3 disputes the taxibility of such property he may raise that question by petition in equity in the Superior Court of the County where said property is assessed.

"'Sec. 8. Be it further enacted, That all laws and parts of laws in conflict with this Act be and the same are hereby repealed.

Approved August 15, 1908."

(It will be noted that neither complainant's intestate, nor complainant availed themselves "of the administrative remedies afforded by the Statutes, as construed by the State Court" to quote the language of this Court in the case of First National Bank vs. Board of Commissioners, Weld County, Adv. Sheets, U. S. Reports, 68 L. E., 466). The asessments were for the years 1911 to 1917 as stated. In 1913 the Legislature of Georgia passed what is known as the equalization law, Act of 1913, page 123. Complainant's intestate made no returns for 1913, 1914, 1915, 1916 and 1917, and therefore did not seek to have his taxes equalnzed under this Act for these years. We quote this Act in part as follows::

ACT OF 1913, PAGE 123

The caption is as follows:

"An Act to regulate the return and assessment of property for taxation in this State, to fix the time for the annual opening and closing of the Tax Digests in the several counties in this State; to create and provide for County Boards of Tax Assessors in each county; to fix their qualifications and compensation; to provide for their appointment and removal and term of office, and to define their duties and powers, and oath of office; to provide for just and adequate returns of property for taxation and secure the equitable valuation thereof and provide a method of arbitration for the adjustment of differences, and fix

the powers and compensation of said arbitrators; to create the office of State Commissioner and provide for his appointment, qualification and term and oath of office; to fix his compensation and provide for his clearical and other necessary expenses; to define his powers and duties; to provide for the supervision, regulation and correction by him of the County Tax Digests, and for other purposes."

Section 2 is as follows:

"Sec. 2. Be if further enacted by the authority aforesaid That there shall be and is hereby established in each of the several counties of this State, a Board of County Tax Assessors. Said County Board shall consist of three members to be appointed by the Board of County Commissioners, or by a majority thereof, or by the ordinary in counties which have no Board of Commissioners. The order making such appointment shall be regularly entered upon the record of the Superior Court of the County, and a certificate from the Clerk of the Superior Court reciting said order, and that such person has taken the oath required by law, shall constitute the commission of the members of such County Board of Tax Assessors and no other or further form of commission shall be required."

Section 3 provides for the appointment of assessors.

Section 4 prescribes qualification, oath, eligibility, compensation, and method of removal of assessors.

Section 5 provides for the selection of a chairman, etc.

Section 6 is as follows:

"Sec. 6. Be it further enacted by the authority aforesaid, That the said Board of County Tax Assessors in each county shall meet each year within ten days from the date of the closing of the tax returns for the current year, to receive and inspect the tax returns to be laid before them by the Tax Receiver as hereinbefore provided. It shall be the duty of said board to examine all the returns of both real and personal property of each tax payer, and if in the opinion of the board any tax payer has omitted from his returns any property that should be returned or has failed to return any of his property at a just and fair valuation, the said board shall correct such returns and shall assess and fix the just and fair valuation to be placed

on said property and shall make a note thereof and attach the same to such returns. It shall be the duty of said board to see that all taxable property within the county is assessed and returned at its *just and fair valuation* and that valuations as between the individual tax payers are fairly and *justly equalized so that each tax payer shall pay as near as may be, only his proportionate share of taxes.* When any such corrections, changes and equalizations shall have been made by said Board, it shall be the duty of the board to immediately give notice to any tax payer of any changes made in his returns, either personally or by leaving same at his residence or place of business, or, in case of non-residents of the county, by sending said notice through the United States mails to his last known place of address.

If any tax payer is dissatisfied with the action of said Board, he may within ten days from the giving of said notice in case of residents, and within twenty days in case of non-residents of the county, give notice to said board that he demands an arbitration giving at the same time the name of his arbitrator: the board shall name its arbitrator within three (3) days thereafter and these two shall select a third, a majority of whom shall fix the assessments and the property on which said tax payer shall pay taxes, and said decision shall be final, except so far as the same may be affected by the findings and orders of the State Commissioner as hereinafter provided. The said arbitrators shall be free-holders of the county and shall render their decision within ten days from the date of the naming of the arbitrator by said board, else the decision of said board shall stand affirmed and shall be binding in the premises. Said arbitration shall be had and the said arbitrator shall be compensated in the same manner as is now provided for the arbitration of individual tax returns, except in so far as the existing law may be modified by the provisions of this section.

Before entering upon a hearing, the said arbitrators shall take an oath before the Tax Receiver that they will faithfully and impartially make a true and just assessment of the tax returns and property in question and will determine the matters submitted to them, according to law and the justice and equity of the case."

Section 7 defines duties and power as to investigation into property owned in the County, etc.

Section 8 is as follows:

> "Sec. 8. Be it further enacted by the authority aforesaid, That the County Board of Tax Assessors, may, by rule or regulation, provide the manner of ascertaining the value for taxation of any property, real or personal, not appearing in the digest of the preceding year, and in cases where there has been a change of ownership from any cause; it being the purpose and intent of this Act to confer upon the said board full power and authority to have placed *upon the digest of the current year an assessment or valuation of all property of every character in the county that is subject to taxation;* provided, that nothing contained in this Act shall apply to those persons, firms or corporations who are required by existing laws to make their returns to the Comptroller-General.

The balance of the Act has reference to the creation of the office of State Tax Commissioner and a definition of his duties, etc. But this portion has no bearing on this case, so we shall not quote further.

(For the two years 1911-1912, had a return been made, complainant's testate could have had his taxes equalized or arbitrated under the Act of 1910, page 27 and for 1913-17 under the Act of 1913; or, complainant, his executor, could have availed himself of the remedy prescribed by the Act of 1918, page 232. He did neither. By not having made a return for taxation of the property in question, White, and complainant failed to take advantage of the administrative remedies provided, and complainant has no cause to complain in equity).

The Tax Receiver after the withdrawal of said notice of June 4, 1918, did nothing more toward assessing said property, and in December 1918, after the passage of the Act of 1918, page 232, above, the State filed a mandamus against Steed, Tax Receiver of Richmond County, to compel him to proceed to do his duty and assess the property in question from the best information he could obtain as required by law, alleging that the said Tax Receiver was *acting against the interest* of the *taxing authorities* and *in behalf* of said *Estate* in refusing to assess said property. In answer to

the rule ni si issued thereon, the tax receiver defended upon the ground that he did not know whether such property was taxable in Richmond County, Georgia; that if it was taxable he did not have sufficient information as to the ownership thereof by White on the several taxable dates in the years 1911 to 1917; that he had no sufficient information as to the value of such property on any of the taxable dates for any of said years as would authorize him to assess the same for back taxes, etc., and for these reasons resisted the issuance of a mandamus absolute.

The mandamus then came on for hearing in the Superior Court of Richmond County, on June 14th, 1919, whereupon the court announced that he would not make the mandamus absolute, but would retain jurisdiction of said cause and in order to enable the taxing authorities to procure the evidence of members of the firm of Henry Clews & Company, Bankers, of New York with whom it was alleged that said securities were on deposit.

Thereafter, the testimony of J. B. Clews, a member of said banking firm was taken, and he testified that said White had had on deposit with said firm all of said securities, or their equivalent in value, on the several taxable dates for the years 1911 to 1917, both inclusive; that White from time to time had borrowed money from said firm but all of such indebtedness had been paid on or before January 1, 1917. He also furnished an itemized list of such securities, which list was then submitted to Marion M. McPherson and Robert W. Dougal, expert loan clerks of the Bankers Trust Company of the City of New York, whose duties were to appraise the various securities handled by such Trust Company. They thereupon valued the same on the several taxable dates for the years 1911 to 1917, to wit, February 1, 1911, January 31, 1912 and January 1 for 1913, to 1917, all inclusive, and made oath thereto. This testimony of Clews, McPherson and Dugal, who then submitted to the Court and the tax receiver of Richmond County and the same not being contradicted or disputed by Callaway, Executor, the Tax Receiver thereupon assessed said securities at such values and notified Callaway, Executor of such assessment.

The tax receiver then amended his response to the mandamus and set out that he had issued a second notice to said Callaway, Executor, on the 10*th day of June*, 1919,(practically a year after the passage of the Act of 1918, page 232), again demanding a return of such property for taxation for the seven years in question; that said Callaway failed to make a return of said securities thereunder; but made a return which did not include the property demanded to be returned which was rejected; that he then assessed such property according to the values as shown by the evidence above referred to, and prayed that a mandamus absolute be refused.

After the assessments made by Steed, Tax Receiver, pending the mandamus proceedings, the State sought to make Callaway, Executor, a party to such mandamus proceedings upon the ground that he had by his acts and doings virtually made himself a party thereto. After the tax receiver amended his response to the rule ni si of the mandamus setting up that he had already assessed the property in question according to the values shown by the evidence submitted, the court sustained a demurrer of Callaway, Executor, to the State's petition seeking to make him a party to such proceedings, and dismissed the same, and at the same time, denied a mandamus absolute against the tax receiver because he had already done his duty and assessed said property. This ruling was carried to the supreme court of Georgia and that court, while holding that Callaway, Executor might have come into said mandamus proceeding voluntarily, that while mandamus was the proper remedy to compel the tax receiver to act but it appearing that he had acted, the mandamus was properly refused, and affirmed the decision of the lower court.(Richmond County vs. Steed, 150 Ga., 229).

Pending the mandamus proceedings, Callaway, Executor, assuming that he was still entitled to arbitration as provided by law, prior to the Act of 1918, touching tax matters, after he received notice from the tax receiver of Richmond County that he had assessed said securities according to the valuation as shown by the evidence of Clews, McPherson and Dugal, on August 7, 1919

(more than a year after the passage of the Act of 1918, page 232) wrote the following letter to C. A. Steed, Tax Receiver, demanding an arbitration, to wit:

"Augusta Ga., August 7, 1919.

"Hon. Clifford A. Steed, Tax Receiver of Richmond County. Augusta, Georgia.

In Re: Estate of J. B. White

"Dear Sir:

"I am writing as the Executor of the Will of J. B. White to notify you that I am dissatisfied with the assessments which you made upon the personal property of the estate of J. B. White for the years 1911, 1912, 1913, 1914, 1915, 1916, and 1917, under date of July 28th, 1919, and exercising the privilege given me by law, *now within twenty days* from receiving the notice from you of said assessments, I hereby request that said assessments be referred to arbitration, as provided by law, and I hereby notify you that the arbitrator chosen and selected by me for such arbitration is Percy E. May.

"Please notify me of the name of your arbitrator as soon as practicable.

"Very truly yours,

"E. H. Callaway, Executor of the Will of J. B. White."

The tax receiver (Print page 28) complied with Callaway's demand for arbitration and submitted the assessments to arbitration. This arbitration was scheduled to be held on the afternoon of September 2, 1919. On the morning of September 2, 1919, the State presented a petition in equity to the Judge of the Superior Court of Richmond County seeking to enjoin the holding of such arbitration upon various grounds, in which petition the Act of 1918 was not plead or referred to. Upon this petition, the lower court refused to grant a temporary injunction, and also refused to grant a supersedeas to such ruling, wherupon the arbitration came on for hearing in the afternoon of said 2nd day of September, 1919. *At this* hearing counsel appeared for the tax-

ing authorities and stated that they *waived no right by such appearance.* (which they could not do). After the hearing, such Board proceeded to return an award fixing the valuation on the property at approximately 10 per cent. of the admitted values thereof.

Thereafter, on the 6th day of September, 1919, the State filed another petition in equity to the superior court of Richmond County in which it sought to set aside said award, alleging that the same was void upon various and sundry grounds. To this petition, Callaway, Executor, demurred generally upon the ground that the petition did not set forth any equitable or legal cause of action. This demurrer, the Judge of the Superior Court sustained, and dismissed said equitable petition brought to set aside said award upon general demurrer.

From the ruling of the court refusing the *temporary injunction* first above referred to, the State sued out a bill of exceptions to the Supreme Court of Georgia, which court by decision reported in 150 Ga., 252, affirmed the lower court. In this decision, no reference was made to the Act of 1918.

The State *also* sued out a bill of exceptions to the Supreme Court of the State, *sustaining the demurrer of Callaway*, Executor, dismissing the petition *brought to set aside the award.* This ruling the Supreme Court also affirmed by decision reported in State vs. Callaway, 152 Ga., 871, in which it held that as said arbitration was led subsequent to the passage of the Act of July, 1918, Public Laws 1918, page 232, such Board's award was void because such Act of 1918, page 232, had repealed the right of arbitration as previously existed, so far as delinquent tax payers of Callaway's class were concerned, and that therefore the lower Court did nor err in dismissing said petition upon general demurrer, that said Executor's remedy was thereunder had he desired to raise the issue of excessiveness to the assessments made by Steed, Tax Receiver; and that equity would not lend its aid to set aside an utterly void award.

After the rendition of this decision, Callaway, Executor, disregarding the remedy prescribed by the Act of 1918, filed this bill in the District Court of the United States to enjoin said executions so issued.

It was further contended: That prior to 1918 the statutes of Georgia had prescribed the remedy of arbitration in all tax matters where the question arose between tax payers and tax officers touching the value of property which had been assessed; that although the Act of 1918, purported to deny that right to tax defaulters of complainant's class, the State having entered into this arbitration was bound thereby. It was then alleged that if this were not true and the Act of 1918 should be held to deny complainant such right of arbitration, it was unconstitutional in that it was directly and expressly discriminatory as it expressly reserved to that class of tax payers who were required to make returns to the Comptroller-General of the State, the right of arbitration, and in violation of the uniformity clause of the tax provision of the Constitution of the State of Georgia, Art. 7, Sec. 2, paragraph 1, and also in violation of Art. 4, Sec. 1, paragraph 2 of the Code of Georgia; that while the system or plan of arbitration adopted by the legislative branch of the State as the uniform method of finally fixing the value of all property in the State for assessment in payment of taxes, the same had not produced exact equality and had resulted in the assessment of all property at values greatly less than fair market value, said system had been uniformly adhered to by the legislative branch of the State Government; and that if the Act of 1918 as claimed, denied the Estate of complainant the statutory right of arbitration, while reserving to all other tax payers of the State, *except those in his class*, said Act was discriminatory and in violation of the uniformity tax provision and the impartial protection provision of the Constitution of Georgia.

It was then alleged on information and belief that under the system of taxation and assessment of taxes in said State as enforced by the tax officers using and adoptin said method for the years 1911 to 1917 inclusive, the assessment and valuation of all

property in the State did not average twenty five per cent. of the full market value thereof, and stocks and bonds, money, notes and accounts did not amount to ten per cent. of the true value thereof, whereas the award of said arbitrators fixed the value of said securities at twelve per cent. to twenty-five per cent. of the full alleged value thereof; that the County Board of Tax Assessors for 1918 (a year 11 years after year property was first assessed for and one year later than the last year he assessed for) assessed said property for the year 1918 at $250,000, whereas the arbitrators for the year 1917 fixed the value at $360,813.92, or forty-four per cent. greater than the said County Board of Assessors; that said award had been approved by the Courts of the State and was final as to the amount of assessment for the purpose of taxation, andthat, if the same was to be treated as a nullity under the Act of 1918 and complainant forced to go into a court of equity in the County of Richmond and there have the question of excessiveness determined the same would be discrimination against him, and in violation of the uniformity tax provision and the impartial protection provision of the Constitution of Georgia, and the due process clause of the Fourteenth Amendment to the Constitution of the United States. Upon information and belief, it was further alleged that for the years 1911 to 1917 both inclusive, local bonds were not returned; that during said years inventories of a large amount of estates appear upon the records of the Court of Ordinary of Richmond County, which showed taxable securities amounting to more than one million dollars which had not been returned for taxation and that the *Tax Receiver of said County*, nor any agent or representative of the *State had made any effort* to have such property assessed for taxation for said years, except in one small estate in which there was a *settlement* made at a nominal percentage of the full value; that the Tax Receiver claimed that neither he, nor the County Board of Tax Assessors of said County ever assessed property at its full value, but tried to assess real estate at 66 2-3 per cent of its value, and money, notes and securities, where returned, at 50 per cent. of their value; that therefore the act of said Tax Receiver in making the assessments of July 28, 1919, for the amounts which he did, and

the issuing of the executions thereon sought to be enjoined, was grossly discriminatory against said estate, and was an administration of the law by said tax officials in a manner and with results grossly discriminatory against said estate. (There were certain allegations in the petition touching National Bank Stock, which appeared on the list of property furnished the Executor by the Tax Receiver he had assessed, under the head of: "Stocks Not Taxed and Deducted" with a line drawn through the National Bank stock. It appears from the record that this stock was not deducted however, but was included in the amounts for which executions were issued through an error in addition, and it was stipulated that these taxes might be abated, Print page 249).

The prayers of the petition waving discovery, were, for a temporary restraining order; permanent injunction upon the final hearing; that the executions set out be cancelled; that the assessment of taxes against the Estate of J. B. White on said unreturned property for the years 1911 to 1917 inclusive, "be, by decree of this Honorable Court, fixed finally and conclusively at the amounts respectfully ascertained, named and determined in the award of said Board of Arbitrators on September 2, 1919, and that the payment by your Orator of the full amount of taxes due on said assessments, including principal and interest, as calculated by said Tax Collector, to September 5, 1919, namely, the sum of $27,980.88, which said sum was tendered by your Orator to said Tax Collector on said date, shall be in full settlement and satisfaction of all State, County and School taxes due by the Estate of said J. B. White for said years", (Print page 20-21); that said defendant tax officials, their agents and attorneys be enjoined from instituting any other proceedins for the collection of said taxes for said years; that a rule ni si be issued; that plaintiff be granted such other relief as he might be entitled to, etc.

Udon this petition being presented to Hon. Beverly D. Evans, then Judge of the United States District Court for the Southern District of Georgia, he issued a rule ni si, which was duly served upon the Governor of Georgia and the Attorney General, and called to his aid to pass upon the application for an interlocutory

injunction, the Honorable Alexander C. King, Circuit Judge for the Fifty Circuit, and Samuel H. Sibley, Judge of the District Court of the Northern District of Georgia.

Subsequently to the filing of the original bill, there were several amendments presented and allowed; one of them being a plea of res adjudicata to which amendment complainant attached copies of the two State Court suits, last above referred to. These amendments however, did not materially change the original complaint, so we shall not go into a further statement of the allegations thereof.

MOTION TO DISMISS

The respondents named, appeared and filed first motions to dismiss in the nature of demurrers, to the original complaint and the several amendments,—the salient points of which were as follows:

Because the averments did not entitle complainant to the equitable relief sought; because he failed to allege that he was in possession of, or had title to any property which could be clouded by the tax fi fas; that it did not set out any property in his possession subject to said tax fi fas, and he was not in position to raise the questions set up in his petition as he had no property interest to be protected; that neither the State nor any of its officials were seeking to deprive plaintiff the equal protection of the laws, because it appeared that he had never appealed to the State laws for protection; because he had never sought to follow the remedy prescribed by the State law to meet the conditions set out in his petition, to wit, the remedy prescribed by the Act of July 31, 1918 (Public Laws 1918, page 232) which provided the only remedy for defaulting tax payers whose unreturned property had been assessed for unpaid taxes, to dispute the taxability of the property taxed, or the value placed thereon, by petition in equity, addressed to the Superior Court of the County of the State where such property was assessed; that plaintiff was a defaulter or delinquent tax payer, in laches, and did not come into

court with clean hands, but set up claims of inequitable discrimination between himself and other tax payers which should have been raised during the years 1911 to 1917 before they paid their taxes upon returns as made by them during said years; that no penalties were being enforced but the apparent effort of the State was to collect the usual ad valorem taxes on the fair market value of the property assessed and it was no defense to plaintiff—a defaulter—that other tax payers had not returned their property at its market value in the years 1911 to 1917, especially as it was not made to appear that the Tax Receiver of the State knew of such non-return, or that tax payers were holding out and not returning property subject to taxation, nor did plaintiff show by his bill that his testator brought this condition, if it existed, to the attention of the Tax Receiver in 1911 to 1917, and that such official had refused to assess such property at its true value, when by the law of Georgia, it was his privilege to so have informed the Tax Receiver; that the allegations did not show that there was any unequal, arbitrary or systematic inequitable discrimination being practiced against plaintiff; that complainant's testator was the original defaulter in the years 1911 to 1917, which was followed by complainant, his executor, and when he was called upon by the Tax Receiver to return the property in question for taxation in June, 1919, he refused to do so, and forced the Tax Receiver to assess said property under the Act of 1918 from the best information he could obtain, and that complainant had not contested or denied such value, but claimed that he should not pay taxes thereon upon the market value thereof; that complainant, an executor of a defaulting tax payer presented no equitable reasons to enjoin said tax executions under the Fourteenth Amendment to the Constitution of the United States, and thus prevent the State of Georgia and its political subdivision from collecting its revenue when there was no dispute as to the value of the property assessed; that the court had no jurisdiction to review the award set up by plaintiff, and if it had, it was apparent that the same was void, because in July, 1919, there was no such proceedings allowed him, as there was no legal power in the Tax Receiver to enter into such arbitration after July 31, 1918; that

there was no legal power in the Board of Commissioners of Richmond County to appoint an umpire in such arbitration after July 31, 1918; that the State was not bound by any action of said Board of Arbitration or the Tax Receiver as the Act of 1918 repealed the right of arbitration so far as complainant was concerned. (P. 34, 186).

ANSWER OF RESPONDENTS

Respondents also filed answers to said petition as amended in which they denied all allegations of complaint as to discrimination, etc., and in which they set out in detail why the executions should not be enjoined, but we shall not attempt to recapitulate here a statement of the various facts set out in said responses, as to do so would be to unduly lengthen this brief.

The case then came on for a hearing before the court as constituted by order of the Hon. Beverly D. Evans shortly thereafter, and it was held by the Court thus constituted that it was not such a case as required three Judges, whereupon the Hon. Beverly D. Evans entered an order temporarily enjoining the enforcements of the tax executions until a final hearing could be had thereon. Subsequent to the issuance of this order, (P. 82), Judge Evans died, and the Hon. William H. Barrett, was appointed his successor, and on the 23rd day of September, 1922, the case came on for a final hearing before him, whereupon both parties introduced evidence.

ABSTRACT OF COMPLAINANT'S EVIDENCE

NOTE: Due to the manner in which complainant offered his evidence a good deal thereof is duplicated in the record and therefore appears in several different places therein; for instance, complainant attached to his plea of res adjudicata copies of the record in the State Court, to which were attached copies of the various and sundry evidence which he had offered before a Board of Arbitration and the award of such Board of arbitration (Print pages 114-130, and 142-161), and such evidence he then offered separately and detached from such record. In order to

prevent repetition in our abstract of the evidence, we shall follow that as outlined in the assignment of errors, for in such assignment of errors all of the evidence is quoted in substance, but we shall refer to the pages of the print where such evidence is to be found in the Record as well as the assignment of errors; and in order to avoid further duplication as far as possible, we shall immediately after each piece of evidence abstracted, set out the objections urged to the admissibility thereof, in the lower court, and the assignment of error thereon, in this court, as each piece of evidence offered by complainant was objected to as offered.

Complainant introduced in evidence:

Copies of the two State Court suits; the first brought to enjoin the holding of the arbitration in which the Act of 1918 was not considered or referred to by the Court; and the other brought to set aside the award returned by the arbitrators, the holding of which had been sought to be enjoined, which last decision held that the award was void because the Act of 1918 page 232, repealed the right of arbitration to which last record was attached the award of said board of arbitration and the evidence produced before such board all of which was reintroduced.

The objections urged to the admissibility of this evidence and the assignments of error thereon in this Court are as follows:

1. Because plaintiff before filling the petition in this case, failed to do that equity which would enable a court of equity to hear him, to wit, failed to pay the amount of taxes admitted to be due before the filing of the petition in this case.

2. Because said record contains no facts showing that the issues set up in the present proceeding were adjudicated and passed upon therein, and the same therefore is inadmissible as evidence of res adjudicata of such issues.

3. Because plaintiff by his bill is claiming that he has been illegally discriminated against by being assessed more than other tax payers and there is nothing in said record which establishes

any such fact, and said record and exhibits thereto are therefore irrelevent.

The harmfulness of such ruling in allowing the introduction of such record is made self-evident when the judgment of the court shows that to all intents and purposes it made the award of such Board of Arbitration its judgment; although holding the same to have been illegal and void by reason of the Act of 1918, which denied the right of arbitration to tax defaulters and remitted then for relief to the Superior Court of Richmond County. (Print page 256).

(See judgment of the lower court, at bottom of page 198, and top of page 199 of Print).

Testimony of C. A. Steed: "I was Tax Receiver of Richmond County in 1918 and remember the assessment placed upon (Page 202-31 Transcript and 153-6 Exhibit Record State Court suits, 255 assignments of error) the securities of J. B. White for that year. It was $250,000. I remember the Jack Estate. It was assessed at $150,000. If the entire return of stocks and bonds of Richmond County for last year was $482,000, that would leave to the balance of the County $132,000. I did not follow literally the figures of the affidavit in th eassessment;—in a hurry I put some figures down there, I think probably $150,000 too much, as they don't tally. My assessment amounts to about $150,000 more than Clews & Company's statement shows. The affidavit of Mr. Dougal and McPherson were brought down here.

"We had a rule not assess for the full market value. In starting out where there is no arbitration I would probably make the assessment at the full market value, but whenever it gets down to an arbitration, I never make it at true market value, but I would almost always take the first assessment and put it down, and if the parties forced me to an arbitration, settle on some basis later on lower than the full market value. The Board of Assessors never go over two-thirds valuation on mortgages, stocks and bonds. I have not been doing that. That has been done by the Board of Assessors.

"When I make assessments, it is generally in accordance with the property value. I have never undertaken to assess any property at its full market value. I know of other large estates that have been administered here, which I have not undertaken to assess. It has not been brought to my attention. I begin to see that I will have to go after them. So far I have not gotten after them; have not been ordered by the Comptroller-General to do so. I did have one estate that I had an adjustment in,—the Benson Estate. Had instructions from the County Commissioners. There was no arbitration,—we settled it with Mr. Hamilton Phinizy and Pierce Brothers, who represented the Benson Estate. We started out with the full market value and I think we settled on about 33 1-3 per cent.

"Cross Examination: I never reported any of these instances that Judge Callaway asked me about to the Comptroller-General. To be candid with you, I have never examined those records. I knew of these estates in a general way. The State's taxing authorities, outside of its being represented by me, don't know anything about them, up until this year. I didn't think I had anything to do with it until this case came up, and the law was changed last August.

"Redirect Examination: Mr. White paid taxes here during these years. He was the largest tax payer on real estate, approximately $600,000.00.

"Cross Examination: I never did have a tax payer come in to make his returns and state in answer to question number 17 that he had $1,000,000, and I tell him 'I will assess you at $200,000.00'. If you make a return of $100,000.00, I put you down at $100,000.00. If you come to me as tax payer and make your return and say 'I have $1,000,000', I put you down at $1,000,000."

The assignments of error thereon are as follows:

1. As above.

2. Because the said Steed cannot be heard to impeach his official acts by testifying as to what his secret intentions were, nor

as to his having violated the law in making assessments of property as required by law. (Print pages 256-7).

Affidavit of John W. Dickey. (Page 257-Assignments of Error; 145-7-Exhibit State Court Records) wherein he swore that he had been actively engaged as a broker in stocks and bonds in Augusta since 1866; that through his dealings he was largely familiar with the ownership of stocks and bonds by the people of Augusta; that he had from time to time bought and sold to residents of the City of Augusta many stocks and bonds, and had also sold similar securities for local customers; there are or until recently were, outstanding approximately $1,200,000 of bonds issued by local corporations, 75 per cent. at least, being owned by local people; that the Georgia Railroad and Banking Company had outstanding $2,500,000 of bonds, the larger portion of which are owned in Augusta; that from his experiance in buying stocks in non-resident corporations, he estimates that there are from two to three million dollars worth of stocks and bonds in non-resident corporations owned by the citizens of Augusta, and that the stocks in non-resident corporations and bonds of local corporations, not including municipal bonds owned by the people of Augusta, amount in the aggregate to $4,00,000 and upward; that he had from time to time sold stocks and bonds in the Cities of Savannah, Macon and Atlanta and while not familiar with the ownership of stocks and bonds in those cities as in Augusta, he knew the people of Macon owned stocks and bonds to a greater extent than in Augusta, and that he would say that the people of Savannah and Atlanta owned similiar securities from at least twice to five times the amounts of such holdings in Augusta; that the Comptroller-General's report for 1918 showed for the people of Richmond County the returns and assessment of stocks and bonds was only $482,000, and that he was sure such figures did not represent more than 10 per cent. of the aggregate amount of stocks in non-resident corporations, and the bonds of corporations other than municipal bonds, actually owned during said years by the residents of said County; and if deponent is informed, $400,000 of said amount represented the assessment for said year on the stocks and bonds of the Estate of J. B. White and the Estate of D. J.

Jack, the remaining $82,480.00 did not represent more than 2 per cent. of the aggregate amount of such securities actually owned during said year by the people of Richmond County, that he had inspected the figures contained in table No. 12 of the Comptroller-General's report for the years 1916 and 1918 under the heading of "Stocks and Bonds," and from the figures shown in said reports for said years for the Counties of Chatham, Fulton and Bibb, the percentage of stocks and bonds returned in those counties for said years as compared with the amount of such securities owned in said counties would not exceed five per cent. that he was familiar with the custom of parties buying stocks and bonds through brokerage or commission houses on margin where the buyer deposits or pays to the commission house only a part of the purchase price of the stocks and bonds bought for his account, and the brokerage or commission house furnishes the balance of the purchase money and holds the bonds and keeps the stock in the name of the broker until it is finally paid for; that in all such cases the buyer had only a marginal interest in the securities so purchased until he finally paid the balance of the purchase price.

The objections urged to the admissibility of this testimony and assigned as error in this court, being as follows:

1. As above.

2. Because the same does not give the names of any owners of any amount of property, the kind or character thereof, nor that the same was owned on any specific taxable dates for the years 1911 to 1917 both inclusive, so far as said affidavit is concerned all the property referred t omay have been returned and taxes thereon paid by the various owners thereof as required by law.

3. Because the same is merely an opinion of said deponent and is without probative value.

4. Because the same does not show any uniform, systematic method adopted by the Tax Receiver of Richmond County, nor

of any of the other various counties of the State, of discriminating against owners of such property as referred to therein. (Print pages 251-9).

Affidavit of Rufus H. Brown, (P 259-Assignments of Error 147 Ex. State Court Record) wherein he swore as to the amount of the deposits in all the Banks of the City of Augusta for the years 1915, 1916, 1917, 1918 and 1919.

The assignments or error thereon were as follows:

1. Same as above.

2. Because the same is without probative value as to the issues involved.

3. Because said offidavit gives no names, nor does he state that any of said cash was owned by any given persons on any of the taxable dates for the years 1911-1917 inclusive.

4. Because said affidavit does not give the varions names of the depositors of such amounts, whether or not they were residents of the State of Georgia, and owned any money on the taxable dates for the years 1911 to 1917, nor does he state whether or not such money on deposit was not owned either by the United States Government, the State of Georgia, the City Council of Augusta, or non-residents of said State, therefore not subject to taxation in said State; nor that the owners thereof had not returned the same and paid the taxes thereon as the law required. (Print pages 259-60).

Affidavit of E. H. Callaway, dated August 20, 1919,(P 203-4 Transcript; 260 Assignments of Error; and 148-9 Ex. State Court Records) in which he swore that he had examined the records of deeds and mortgages in the Clerk's office of the superior court in Bookks 6 Y's, 6 Z's, 7 A's, 7 B's, 7 C's, 7 D's, 7 E's, 7 F's, and 7 G's, in which books were recorded such instruments during the years 1909 and 1910, and that he found recorded security deeds, mortgages upon real estate, and bond for titles,

exclusive of banks and non-resident lenders, and not cancelled on February 1, 1911 aggregating $1,083,342; that of such securities so inspected by him, there were cancelled during the year 1911, $156,771, leaving uncancelled on February 1, 1912, the aggregate sum of $926,571; that of said securities so recorded, there were cancelled during the year 1912, the aggregate sum of $138,338, leaving uncancelled of said securities so recorded on the first day of January, 1913, $748,233; that of such securities so recorded there were cancelled during the year 1913, $118,651, leaving uncancelled of said securities so recorded on the 1st of January 1914, $629,582; that there were cancelled during the year 1914 of said securities $64,781, leaving uncancelled on January 1, 1915, of said securities so recorded, $564,801; while deponent noted and indicated a large number of cancellations during the years following 1914, he had not tabulated same.

The assignments of error thereon are as follows:

1. As above.

2. Because said affidavit is of no probative value and gives merely an opinion of the said Callaway and does not give the names of any owners of any of the property referred to therein, nor does it state that such property was owned by said parties on any of the taxable dates for the years 1911 to 1917 inclusive; nor does it state that such property was not returned for taxation by the owners thereof on the various taxable dates for said years. (Print page 260).

Joint affidavit of James S. Bussey, Jr. and Henry G. Howard, dated August 20, 1919, (P 260-1 Assignments of Error; 142 Ex. State Court Recort.) which was in substance the same as that of E. H. Callaway, with the exception of amounts stated. (P 149).

The assignments of error thereon are as follows:

1. As above.

2. Because said affidavit is of no probative value and gives merely an opinion of the said Bussey and Howard and does not

give the names of any owners of any of the property referred to therein, nor does it state that such property was owned by said parties on any of the taxable dates for the years 1911 to 1917 inclusive; nor does it state that such property was not returned for taxation by the owners thereof on the various taxable dates for said years. (Print pages 260-61).

Affidavit of .E H. Callaway, dated August 23, 1919, (P 261 Assignments of Error; 152 Record State Court Suits) wherein he swore that he had recently examined the Books of Inventories in the office of the ordinary of Richmond County, showing the inventories of estates from the year 1913 to the year 1918 inclusive; that he took figures only from estates exceeding in value $10,000, and tabulated from said inventories only the reported money in Bank, solvent and secured notes, taxable bonds and stocks in non-resident corporations, and thus tabulating sixty-six estates during said years, the aggregate amount of such property consisted of $1,579,122, which did not include the Estate of J. B. White; and from said examination tabulated cash in Bank, solvent and secured notes, taxable bonds and stocks in non-resident corporations in eighteen estates, the aggregate amount of such property being $1,180,489; said eighteen estates distributed or classified as follows: Stocks in non-resident corporations $421,943; taxable bonds $191,690; solvent and secured notes $323,648; cash in bank $243,208; making a total of $1,180,489.

The objections urged against it and assigned as error in this Court being as follows:

1. As above.

2. Because said affidavit is of no probative value and gives merely an opinion of the said Callaway and does not give the names of any owners of any of the property referred to therein, nor does it state that such property was owned by said parties on any of the taxable dates for the years 1911 to 1917 inclusive; nor does it state that such property was not returned for taxation by the owners thereof on the various taxable dates for said years. (Print pages 261-62).

Extracts taken from the Comptroller General's Annual Report of the State of Georgia, for the years 1911 to 1917 (P 262-4 Assignments of Error; 210 Transcript), showing the amount of money, solvent debts, merchandise, stocks and bonds in the Counties of Richmond, Bibb, Chatham, Burke, Wilkes, Columbia, Putnam, Morgan, Habersham, Troupe, Coweta, Floyd and McDuffie; aggregating for each of the said years in money and solvent debts from one to two million dollars, and in merchandise, two to three million dollars, and in stockks and bonds aggregating from $139,000 to $865,000, for the Counties of Richmond, Bibb, and Chatham; and in the County of Burke in money and solvent debts from $210,000 to $500,000, and in stocks and bonds from $5,000 to $19,000, etc.

Also an extract from the printed report of the Comptroller-General of the State of Georgia, for the year 1912, (P 211) and addressed to the Governor of Georgia on the subjects of "Revision of Tax System" and Invisible Personal Property". This excerpt urged a revision of the revenue system, and stated that the defective and disjointed machinery for assessing property for taxation permits much of the taxable property of the State to escape taxation altogether, and a very much larger proportion to evade its just and equitable part; that it was not necessary to state that the evils of our system obtain equally in the case of assessment of property of individuals as well as corporations, and as well in the several counties of the State; that it was a well known fact that in many cases the assessment of property in counties adjoining each other, and where practically like conditions exists, differ very widely thus, placing on citizens in one county heavier burdens than are borne by their neighbors in the other. That taxation should be uniform, and a system of assessing property should be provided to accomplish as far as possible uniformity. That in addition to the lack of uniformity and equality in our tax assessments which I have said so uniformly obtain under our present system, there is yet a much greater evil resulting from it. I refer to the listing for taxation of such property which might be termed invisible personal property, such as notes, mortgages, accounts, stocks, bonds and choses-in-action.

It is a generally known fact that this class of property in this State represents a considerable part of the wealth of Georgia, yet it is equally true that but a very small amount of it is ever returned for taxation. Some method should be adopted to reach this property and place it on the tax books, and compel it to bear its just burden of the government. The State of Alabama has a statute providing for county tax commissioner to look up all omitted property from the tax rolls of their counties. I might add that the City of Atlanta has tried this method very satisfactorily for several years, and I would recommend that something of this kind be provided for the State. The present system of assessment is but little better than voluntary contributions by taxpayers to the State's revenue.

The objections urged against the admissibility of this testimony, and assigned as error herein are as follows:

1. Same as in first assignment.

2. Because said statement does not show any discrimination, and does not show the names of the owners of any property on the taxable dates for the years 1911 to 1917 inclusive.

3. Because the same is merely hearsay and is only an opinion.

4. Because the same does not show any specific property owned by any persons on the taxable dates for the years in question.

5. Because all the property listed by the Comptroller General so far as said report goes may have been owned by corporations, such as banks, who were not required to return the same.

6. Because said report was not dealing with unreturned property which had been concealed by tax payers.

(a) Because the same does not show that any stocks and bonds owned by any tax payer in the State was returned at any percentage of the value thereof, but under the head of "Stocks and Bonds" appears simply a gross sum as being what was returned in the several counties shown.

(b) Because so far as such excerps show, all of such property was returned and taxed as the law required, to wit, at its fair market value, by the owners thereof.

(c) Because the figures shown under the head of "Stocks and Bonds" may appear seemingly small, the court cannot reason therefrom that such property has been allowed to escape taxation by the failure of the taxing officers to do their duty under their oaths; neither can the court reason therefrom that because such figures appear smaller than would be expected, that therefore all property in the State has been assessed at not more than a small percentage of its value and by such reasoning hold, that the Tax Receiver in making the assessments complained of, illegally, and unconstitutionally discriminated against the Estate of J. B. White, but such fact must be proven to all "intents and purposes", as was said by the Supreme Court of the United States, quoted in the Wright case, 125 Ga., 589,—such proof must be postive, direct and unequivocal and there are no facts contained in any of said reports which tend to prove any such fraudulent, systematic, illegal and unconstitutional discrimination as is inhibited by the Fourteenth Amendment to the Constitution of the United States, or that any such was caused by the Tax Receiver of Richmond County, Georgia, against the complaint in this case. In other words, the court will not assume nor take judicial cognizance that stocks and bonds, such as are here involved,—stocks and bonds in foreign corporation—were owned by persons on any taxable dates that they should have been taxed in said State, but were not returned or taxed. (Print pages 262-65).

Extracts from the 7th Annual Report of H. J. Fulbright, State Tax Commissioner, for the year 1920, (P. 212-14 Transcript; 265 Assignments of Error) which report gave a general resume of his acts and doings and recommendations with reference to the tax system of Georgia, and stated that values were not ordered reduced in any County, as being disproportionately high, for the reason that they nowhere approached the legal requirement of 100 per cent.; that at that time (meaning the year 1919) the whole ★

and for that reason the State Tax Commissioner did not think it wise to insist upon a strict compliance with the law that requires all property returned at full value, etc.; that the estimated true value as of January 1, 1920, for the various counties of the State and the per cent. as returned for taxation which showed estimated percentage of returns to range from 56 per cent. to state was enjoying great prosperity as to very much inflate values, 60 per cent. as he calculated.

The objections urged against this testimony being as follows:

1. Same as above.

2. Because said report has no probative value and is merely the opinion of said Fulbright. (Print page 265).

Affidavit of E. H. Callaway, dated September 18, 1922, (P. 66 Assignment of Error; 216 Transcript) wherein he swore that certain inventories of twelve estates, formerly residents of said County, certified copies of which were offered in evidence, were included in the inventories of the sixty-six estates that were examined by him and referred to in his affidavit of August 23, 1919, and also in his affidavit of April 22, 1922, and were selected at random, showing some of the larger estates administered in said County, and some of the smaller estates; for the years 1915 to 1918 the records of inventories disclosed more than one hundred estates where the decendents, were residents of, and owned either money, notes and credits, or taxable stocks and bonds, or both, in said county, and for the years 1911 to 1917 inclusive, show the record of more than two hundred estates where the decendents were residents of said county at the time of their death and owned either money, notes and credits, or taxable stocks and bonds, or both, and in all of said instances the Tax Digest of said County for the years immediately preceding the death of said intestates, disclose that they made no returns of any money, notes or credits, or taxable stocks and bonds for taxation, and in the few rare instances where any such property was returned, it was only in a nominal amount; that the proportion of said classes of property returned by the decendents in the twelve estates where certified

copies of inventories and tax returns are introduced in evidence, discloses a fair average of all tax returns made of said classes of property, to wit, money, notes and credits, and taxable stocks and bonds for all the decedents of said County, for the years 1911 to 1917 inclusive; that notwithstanding said facts, with reference to said estates, was brought to the attention of C. A. Steed, the Tax Receiver, and to the attention of his attorneys who brought the proceedings to collect the back taxes from the estate of J. B. White, in the affidavit of deponent of August 23, 1919, which was used before the arbitrators in the Tax Arbitration proceeding on September 2, 1919, and were again called to the attention of said attorneys in the affidavit of deponent, of April 22, 1922, for the hearing for interlocutory injunction in the present case; no proceedings have ever been instituted eithr by the Tax Receiver, nor by his said attorneys who instituted the proceedings in this cause, nor by any other tax officials of said State or County; the only other instance of any attempt to collect back taxes, as testified by the Tax Receiver before the arbitrators, was on the Estate of Wm. E. Benson, and that this was settled for 33 1-3 per cent. on the dollar; and that the conduct on the part of said attorneys representing said tax officials in the present case, and of said Tax Receiver and all other tax officials of the State or County who have had any connection whatever with this cause, amounts to deliberate, intentional and willful discrimination against the Estate of J. B. White; that all of said decedents, the inventories of whose estates were produced as evidence in said cause, were residents of said Richmond County for more than seven years prior to the dates of their respective deaths.

The objections urged against its admissibility being as follows:

1. Same as in one above.

2. Because said affidavit contains no facts showing discrimination, nor does it deny the value of the property as assessed by the Tax Receiver.

3. Because the same is merely an opinion of the said Callaway and states no facts showing illegal and unconstitutional discrimination. (Print pages 266-67).

Assessment made by the Board of Equalizers for the year 1918, (P 217 Transcript; 267 Assignments of Error.) upon the property in question; this assessment showed that such Board of Equalizers for that year assessed the same property which the Tax Receiver had assessed for the years 1911 to 1917 at $250,000.

1. Same as one above.

2. Because the assessment referred to was for the current year 1918 and has no probative value of the property which was assessed by the Tax Receiver for the years 1911 to 1917 inclusive.

3. Because the act of said Board of Equalizers who only had jurisdiction for the year 1918 does not prove illegal, unconstitutional discrimination in the present case.

4. Because the acts of one Board of Equalizers for a year subsequent to that involved in the present litigation is not admissible to impeach the act of the Tax Receiver, who was the only tax official who had authority to assess the property which he did assess for back taxes.

5. Because it does not appear that said Board had before it, the same evidence of value and ownership as was presented to said Tax Receiver, who made the assessments in question, but on the contrary, that the said Callaway did appear before them and did contend with them as he did with the Tax Receiver as to the taxibility of said property and it was under these conditions that such an assessment was made. (Print page 267).

Affidavit of J. B. Clews, dated August 5, 1919, (P 268 Assignment of Error; 144-5 Ex. State Court Record.) in which he swore as to the amount of indebtedness due by said J. B. White to his firm, and in which he stated that said White only had a marginal interest in said property over and above the amount his said firm had advanced said J. B. White on margin.

The objections urged against the admissibility of this testimony being as follows:

1. As above.

2. Because said affidavit is of no probative value.

3. Because the amount of indebtedness due by said White is inadmissible as there is no law allowing the deduction, of any indebtedness of a tax payer from the value of property owned by him for taxable purposes.

4. Because even if the stocks and bonds were held, as set out by said Clews & Company, as security for any indebtedness, this did not change the legal status of said intangible personal property for taxable purpose and did not remove the situs therein from Richmond County, the domicile of said J. B. White, for the years 1911 to 1917 inclusive.

5. Because when the assessments in question were made, all indebtedness of Clews had been paid as was owing.

6. Because under the law of Georgia, a tax payer is not allowed to deduct any indebtedness owing by him and return only his net worth.

7. Because under the law of Georgia, where a tax payer conveys property to secure an indebtedness he does not change the situs of the property for the purpose of taxation and cannot deduct such indebtedness and return only his equity of redemption on such property for taxation. (Print page 268).

Report made by a Tax Commission appointed by the Governor generally known as the State Tax Commission, (P 268 Assignments of Error) for the purpose of recommending such legislation as they might deem advisable for a change in the tax laws of the State of Georgia. This report is too voluminous to encompass within reasonable bounds, but contained a general resume of the tax conditions of Georgia, as in the opinion of said Board existed, giving their opinion of what the taxable values of the property in Georgia was and in general what the percentage of such values as had been returned for taxation by the tax payers of Georgia was, which showed the average percentage valuation less than 100 per cent. ranging anywhere from twenty-five to fifty per cent.

The objections urged against the admissibility of this evidence being as follows:

1. As above.

2. Because the same is hearsay and does not show who owned the property referred to, nor does it give the name of any property owners who had not returned their property for taxation, nor does it deal with unreturned property at all.

3. Because the same is irrevelent and without probative value. (Print pages 268-69).

Report of John C. Hart, State Tax Commissioner, for the year 1914; (P 269; 217 Transcript) this report contained a general resume of the tax situation as he saw it for such year and contained certain recommendations with reference thereto.

The objections urged against the admissibility of this testimony, being as follows:

1. As above.

2. Because said report is hearsay and without probative value.

3. Because the same does not give the name of any person or statement of any specific property, which had not been returned for taxation; who the owners thereof were, nor was it dealing with unreturned property; and therefore does not show any illegal, unconstitutional discrimination, so far as the present case is concerned. (Print page 269).

An address made by Henry J. Fulbright, State Tax Commissioner, dated January 1, 1919. (P 269 Assignments of Error; 217 Transcript). This address was directed to all County Tax officials of the State of Georgia, in which he stated that he had sought to obtain reliable information as to real values, in order that he might compare such values with the returned values as shown by the Tax Digest of several counties of the State, that he accordingly called them to meet him at different points, as convenient, to confer with him as to values; that he adopted country real estate as the basis of computation for the reason that it was

only that class of property common to all counties, the quantity of which is shown by the tax books; that he compared such values with the average returned value of each county and found the actual per cent of the returned value represented by the returned value; that he assumed other property was returned upon about the same basis and computed the real value of all property in the several counties in this way.

"The aggregate amount as shown by the tax digest of the counties, when submitted to me for approval last summer of all returned and assessed property in the State, is $982,623,580. According to the computation made in the way pointed out above, this represents 32 6-10 per cent of the actual value of the property thus returned for taxes, and a conservative valuation of the property on the tax books, at the present time, is a little more than Three Billion Dollars."

Then went on to state that ninety-six counties fell below the State average of 32 6-10 per cent.; that no one who believed in justice and fairness will oppose some effort of equalizing and certainly no county below the average for the State would hesitate, to take the necessary steps to bring its values up to the average. Then followed the general tsatement of what he sought to do and his reasons for devoting so much time to the work, which was to see that justice was done between all counties. Appended to this report are tables of all the counties in the State, the first of which shows the per acre average af improveed lands as shown by the Tax Digest in the first column, and the second column the estimated per acre real value, which per acre average ran from $4.50 to $37.85 per acre, and the estimated real value ran from $7.50 to $100 an acre in some counties. Table No. 2 showed the aggregate amount of the digest of each county for the year 1919, with aggregate of the estimated value of the property of the county, and the per cent. of real value shown by the return. Table No. 3 showed the counties which should be increased in order to be equalized, etc.

The objections urged against the admissibility of this evidence being as follows:

1. Same as in one.

2. Because the same is without probative value, and has reference to a year subsequent to any of the years for which said assessment have been made.

3. Because the said Fulbright is not an assessinng officer in the first instance, and his conclusions are not proper testimony going to show illegal, unconstitutional discrimination. (Print pages 269-70).

Inventories of the Estate of Moses C. Murphy, Mrs. Julia C. Langdon, David B. Printup, Mrs. Bridget Gallaher, Mrs. Lizzie M. Faerey, Chas. A Crawford, Robert M. Styles, Mrs. Lucy W. Carswell, Mrs. Mary T. Acton, Fred B. Pope, D. F. Jack and Mrs. Madge Williamson Stearns, (P 218-21 Transcript) which inventories showed the amount of property owned by sald several decedents at the date of their death, as appeared of file in the Ordinary's Office of Richmond County, which evidence appellants objected to upon the following grounds:

1. As in one above.

2. Because they are without probative value and show no facts which tend to prove the illegal, unconstitutional discrimination complained of.

3. Because they do not show any of the property listed therein was owned by any of the parties named on any of the taxable dates for the years 1911 to 1917 inclusive.

4. Because if these parties had defaulted in the return of their property, would be no defense to this plaintiff when called upon to pay his taxes justly due upon admitted values.

5. Because it does not appear that the property in question should have beeen returned for taxation, and taxes paid thereon. (Print pages 270-71).

Tax returns of the said foregoing named parties (Print 218-21 Transcript) which showed the amount of property returned for

taxation by said several parties during the years 1911 to 1917 inclusive.

The objections urged against the admissibility of this evidence being as follows: :

1. Because the same are without probative value and do not prove the unconstitutional discrimination contended in this case.

2. Because an inspection of such returns does show that these parties made a return of their property, and in the absence of proof to the contrary, the courts will presume that they made a return of all their property of which they were the owners on the taxable dates of all years prior to their deaths, and that the Tax Receiver did his duty by assessing the same as required by law.

3. Because if it appears that eighteen people in a County, the size of Richmond County, did not make a fair return of their property for the purpose of taxation, is no such proof of unconstitutional discrimination, as would authorize a Federal Court of equity to enjoin the State Revenue Officers in the performance of their official duties. .

4. Because it does not appear that any of the taxing officials had notice of the ownership and value of any of such property during any previous years upon the taxable dates. (Print page 271).

Contracts between attorneys representing the State of Georgia and Richmond County, under which they had been employed to represent the taxing authorities in the present litigation, which in no manner elucidated the matters at issue. (Print page 272).

The error urged against the admissibility of these contracts was because the same were irrelevent.

Affidavit of James P. Verdery, (Print 272 Assignments of Error; 221-2 Transcript) wherein he swore that he had been a resident and tax payer of Richmond County for thirty years, and had been familiar with property values in said County for fifteen years, and a member of the Board of Equalizers in said County

since 1914, and was such member at its meeting in the summer of 1918, when the securities, money, solvent debts of the Estate of J. B. White were before the Board for assessment, and had before it the inventory of the estate showing the ownership by said estate of securities were $500,000 worth of bonds in Georgia corporations and stocks in National Banks located in New York, which they were informed were not taxable in Georgia; that as the Board had understood, the executor of the estate might take the position that the securities were non-taxible; that he, as chairman, obtained an opinion from said Board's advisory Council. Cumming & Harper, under date of June 18, 1918, which letter is attached to the affidavit, and which in substance advised the Board that White being domiciled in Richmond County such property would be taxable there, but in the same letter there was cited the case of Greene vs. Louisville & Inteurban Railway Co. 244 U. S. 499, where it was held that it was the duty of the Board not to discriminate against the Estate of White, but to treat said estate in the same manner as other tax payers of the State and County holding like securities; that after having said letter before it, and after discussing the matter with the executor, who appeared before them, said Board assessed such securities in the aggregate sum of $250,000; that under the law, said Board was not only a Board of Assessors, but a Board of Equalizers, and from the best information he could obtain, the assessment so made by said Board for said year on said securities were at a higher rate percentage of the full values thereof than the *percentage of the returns* of similar classes of property as made by the tax payers of Georgia bore to the full market value for the year 1918, (but what was the market value of such property, was not stated), as well as for the years from 1911 to 1917 inclusive; that it was a fact well known not only to the people generally but to the executive and tax officials of the State, and to the members of the General Assembly, that said classes of securities are not generally returned for taxation by the owners thereof, and when returned, are returned generally at a mere nominal percentage of their full value; (This affidavit as that of the next did not state any systematic rule which said Board has originated nor

did it state at what percentage value property in general was assessed at in Richmond County).

Also an affidavit of H. K. Lowery, another member of said Board of Equalizers, in similar language as that of said James P. Verdery.

The objections urged against the admissibility of this evidence being as follows:

1. Because said Verdery and Lowery are members of the Board of Equalizers, created under the Act of 1918, and their powers extend only to the current year, and what they did or failed to do in the year 1918, is irrelevent and inadmissible to upset an assessment made by the Tax Receiver for the years 1911 to 1917 inclusive, where he was acting within the scope of his duties as defined by law and especially when the value of the property which had been assessed by him was admitted and the same was omitted property for the years 1911 to 1917.

2. Because said affidavits show that said Board in making said assessment for the year 1918, fixed the amount at a mere nominal sum of its admitted value, because the executor was before them contending that none of it was taxable by reason of White's alienage, and such action is no proof that the assessments made by Steed for the years 1911 to 1917 was a violation of the Constitution of the United States as being discriminatory against the Estate of said White.

3. Because the letter attached to the affidavits is irrelevent and admissible and is without probative value touching the issue involved.

4. Because said affidavit contains no facts, but is a mere conclusion or opinion of said parties, as no facts are given upon which to base the assertion that the assessment of 1918 made by said Board was at any higher rate of percentage than that placed upon similar classes of property as made by the tax payers of Georgia, this being the issue which was to be determined by this court.

5. Because even though other tax payers may have returned their property at a less value than it was worth is no evidence that there was any systematic discrimination practiced by Steed, Tax Receiver in making said assessments.

6. Because said affidavits merely show, if they show anything that there may be tax dodgers in Richmond County, but the same does not give the name of a single person owning a single piece of property or the character thereof, which has been allowed to escape taxation by any conduct of the Tax Receiver of Richmond County; nor does it show any taxable dates upon which any such property was owned by one, but said affidavits are nothing more nor less than a mere surmise by the affiants therein. (Print pages 272-73).

Affidavit of one H. R. DeJarnette, P 273 Assignments of Error; 222 Transcript) of Putnam County, who swore that he was a member of the Special Tax Commission, appointed by the Governor of the State of Georgia, under an Act of August 20, 1918, and served as such until the Tax Commission made its report on June 1, 1919; that during the sessions thereof, extending from the Fall of 1918 to the Spring of 1919; he made considerable investigation into the values of various classes of property in Georgia; that where it was possible to get statistics either from the United States Government, Census Departments or other sources, the same was used and made available by said Tax Commission; that it was impossible to obtain any definite or accurate information as to intangible property owned by the tax payers of Georgia, as no statistics were available; but from the amount of money on deposit in the Banks of the State, after making reasonable deductions, and by adding thereto what seemed to be, from inquiry, the relative ownership of solvent debts as compared with the ownership of actual money by the various classes of people of the State, the conclusion was reached that the actual return of money and solvent debts in the State, disclosed by the Comptroller-General's report for 1918, did not represent more than 10 per cent of its fair market value; that deponent and other members of the Commission were confronted with the lack of

statistics from any source, showing the aggregate amount of stocks and bonds owned by the tax payers of Georgia, but from inquiries made of brokers and others, he was of the opinion that the aggregate amount of such property as shown by the Comptroller General's Reports for 1918, did not represent more than 5 per cent. of the full aggregate value; that from the best information he could obtain, that comparatively the same low percentage rates of returns of full values of such property prevailed during the years from 1910 and 1912 down to 1918. Deponent then set out in his affidavit copies of excerps from the Comptroller General's reports from 1911 to 1918, showing the various amounts of money, solvent debts, and stocks and bonds as appeared to have been returned during the years 1911 to 1918; that from reliable statistics as stated above, there was on deposit in Georgia banks in 1918 the sum of $380,000,000; that for said year the Comptroller-General's report showed a return of only $65,613,595; that from the reasons hereinbefore stated, deponent was of the *opinion* that said aggregate returns for the State for said years, of money and solvent debts, did not exceed 10 per cent. and that the amounts set forth above of stocks and bonds as returned for taxation, did not represent more than 5 per cent.; that the conditions above referred to as prevailing in the State were generally known by the people of the State, the executive and tax officials of the State, and members of the General Assembly.

The objections urged against this affidavit and assigned as error in this court were:

1. Because the same is irrelevent and without probative value and does not throw any light upon the questions at issue in said cause.

2. Because same does not give any facts but states mere conclusions and the opinion of said affiant.

3. Because affiant himself states that it was impossible to get any reliable facts upon which to base his conclusions.

4. Because it appears therefrom that affiant accepted as true, certain figures and then proceeded to estimate what percentage would be necessary to make the same.

5. Because he does not give the name of any tax payer who owned any property on any taxable date on any of the years 1911 to 1917 inclusive, nor the value thereof.

6. Because there are no facts set out in said affidavit which show any systematic uniform method of assessing property for taxation in said State, at anything less than its true value, but at most the same merely states the opinion of the witness and this is a fact to be determined by the court. (Print pages 273-75).

Affidavit of G. W. Graham, (P. 275 Assignments of Errors) of Burke County, Georgia, wherein he swore that he had been a resident and tax payer of Burke County for a number of years; that from 1910 to 1916 he was Tax Receiver, whose duty it was to receive the returns of tax payers and make out a digest thereof, one copy of which was sent to the Comptroller-General; that during said period he was familiar with property values and that he set forth extracts taken from the Comptroller-General's report for the years 1911 to 1918 inclusive, showing the returns of average value of improved lands per acre, and aggregate returns of money and solvent debts, and stocks and bonds for said years; that *in his opinion* the average value of returns on improved lands did not represent more than 20 per cent. of the fair market value, and of money and solvent debts, not more than 10 per cent, and of stocks and bonds as shown in said table, not more than 5 per cent. of the actual value of such property as owned by the citizens and tax payers of said county for said years; that prior to the establishment of the County Board of Tax Assessors and Equalizers in 1914, he did all in his power to have the percentage values of property increased, but was unable to do so; that if deponent had assessed such property for anything like its full value, or half value, or 33 1-3 per cent, his assessments would have met with demands for arbitration and such arbitrators would have in each instance, restored the property to its usual price, etc.; that

after 1914 the Board of Assessors and Equalizers made efforts to increase the values and had little more success than he had; that said conditions were not confined to Burke County but existed throughout the eastern section of the State, and so far as deponent was advised, existed throughout the entire State, and *so far as deponent was informed* such condition was known to all tax officials of the State, the executive and legislative departments thereof, and that only in the last few years had any effort been made to increase the percentage of land in returns and assignments for taxation.

The objections urged against the admissibility of this evidence being as follows:

1. Because the same is irrelevent and is merely the opinion of the affiant.

2. Because he has merely copied certain figures from purported reports of the Comptroller-General and then proceeded to estimate what was the percentage of the value of all property in the County of Burke.

3. Because said affidavit with reference to what would have been the effect of an arbitration where an assessment was made at anything like its full market value is utterly without probative value and is irrelevent and inadmissible.

4. Because said affidavit does not give the name of a single person who owned a single piece of property, nor the value thereof, on any taxable date for any of the years 1911 to1917, inclusive, which had not been returned for its fair market value, but is merely the assertion of an opinion by the witness.

5. Because there are no facts set out therein which in the slightest degree establishes any systematic, illegal discrimination practiced by the Tax Receiver of Richmond County in making said assessments complained of. (Print pages 275-76).

Complainant then introduced in evidence 3 affidavits from Morgan County; 3 from Wilkes County; 3 from Floyd County; 3 from Habersham County; 3 from Coweta County; 3 from

Chatham County; 3 from Putnam County; 3 from Troupe County; 3 from Columbia County; 4 from Burke County and 1 from Richmond County, out of 160 Counties in Georgia, all of practically the same import. In each of these affidavits the affiants swore as to his occupation, length of residence in the County, his familiarity with the values therein; and then each copied tables from the reports of the Comptroller-General of the several kinds of property as appeared to have been returned for the several counties and stated *that in their opinion* such tables did not represent more than 20 per cent. of the land value; 10 per cent of money notes and accounts, and 5 per cent. of the stocks and bonds which were owned by the residents of the said several counties, etc. (None of the affidavits gave the name of a single tax payer owning such property on any taxable date for any of the years, nor that the tax receivers knew who owned stocks and bonds and refused to assess them). (Print pages 223-240).

The objections urged against the admissibility of the foregoing affidavits being as follows:

(a) Because all of said evidence is irrelevent and contains no facts which elucidate the issues involved in this case.

(b) Because each of said affiants merely gives his opinion of what percentage of property is returned in his county as it is nowhere stated in said affidavits what is the value of the taxable property in any county.

(c) Because affiants have accepted as true, certain figures which they say were copied from the reports of the Comptroller-General and then proceeded to estimate what percentage of the value of property in said counties the same represented, without showing the value of any property located in any single county, upon which to base said calculation.

(d) Because the only average of any percentage value as shown by the figures copied from said Comptroller General's report appears under the head of "Average Value of Improved Lands," and this merely the average value per acre of land; under the head of "Stocks and Bonds" such figures do not purport to

give any average value, or percentage of value of any such property in said counties, and such parts of said affidavits are wholly without probative value, irrelevent and inadmissible.

(e) Because none of said affidavits state what is the value of a single piece of property located in any of said Counties; nor do they give the names of the owners thereof; nor whether the same was owned on any taxable date in any one of the years in question.

(f) Because none of said affidavits contain any facts which show any systematic, illegal, unconstitutional discrimination practiced by C. A. Steed, the Tax Receiver who made the assessments complained of.

(g) Because all of the affidavits referred to herein show upon their face that they are mere stereotyped affidavits and contain no facts within the knowledge of those making them, as to what is the actual market value of any property in any county; nor at what value a single piece af property was returned for taxation; each one of said affidavits purports to give only an opinion, and that, not of the one making the affidavit, but the person drafting such affidavit. (Print pages 276-80).

After the introduction of the foregoing evidence the respondents then moved to *exclude the same* from evidence—it being all of the evidence of plaintiff, because it did not show any arbitrary systematic, intentional illegal, unconstitutional discrimination against plaintiff as inhibited by the 14th Amendment to the Federal Constitution, which motion was overruled by the Court, and appellants assign the same as error in this court. (P. 280).

ABSTRACT OF RESPONDENT'S EVIDENCE

Respondents also relied upon the assessments and executions that had been introduced by complainant.

The depositions of Clews (Print 142-240-1and 2) as to the amount of stocks and bonds held by his firm for the account of White; also the affidavit of Marion H. McPherson and Robert W. Dugal, (Print 114, etc.) expert loan Clerks of Bankers Trust

Company of New York, giving values of said stocks and bonds on taxable dates for each year in question. This was the evidence furnished Steed, and the same not being disputed, he made the assessments in question according to such values.

Marcus S. Baker, Tax Receiver of Chatham County, (P. 242) swore that he always sought to assess property as required by law; that he had no knowledge of any such property, which had not been returned for taxes, nor the owners thereof; that only recently he had collected a large amount of taxes from estates of decedents who had failed to make a return during their lives; that he knew of no systematic uniform custom prevailing among the Tax Receivers of the State whereby property was assessed at any percentage of its value. (Print 243).

C. A. Steed, Tax Receiver (P 242-3) to the effect that he had always sought to carry out the instructions of the Comptroller-General with reference to assessing personal property such as stocks and bonds in foreign corporations; that he had no personal knowledge of any such personal property nor the owners thereof which had been withheld from taxation; nor had he any information of such during the years 1911-1917; that if such information had been furnisher him he would have acted as in the present instant; that when property was returned at ten thousand dollars, he assessed the same at ten thousand dollars; that the only information he had touching the estates mentioned by Callaway, Executor of White, was contained in the affidavits made by Callaway; that he had no such information as would cause him to require a return of such property for taxation; that he did not know that any of said property wos owned by any of said parties during any of said years; that he had no occasion to examine the Records of the Ordinary's Office, etc.; that he had not acted toward the Estate of White in any different way than he would have acted toward any one else, under like circumstances.

M. C. B. Holley, Chairman Board of Commissioners of Roads and Revenues of Richmond County, Georgia, who swore that he had no information touching the estates mentioned by Callaway in his affidavit as to whether the same was owned by any of the

parties on any of the taxable dates in any of the years in question; that if he did have, he would direct that the same be assessed as was done in the White case. (Print page 244).

Affidavit of Benjamin E. Pierce, (P. 244) to the effect that he had been representing the taxing authorities throughout the White case; that he had read the affidavit of E. H. Callaway, dated September 18, 1922, and denied as stated therein, the charge of illegal, unconstitutional discrimination, etc.

An affidavit of Wm. A. Wright, (P. 245) who swore that he had been Comptroller General of the State for more than 30 years, and that he had always issued books of instructions in which he urged upon the Tax Receivers of the State their duties touching the assessment of stocks and bonds in foreign corporations at their fair market value; that he never countenanced any Tax Receiver allowing the tax payers to return property at any percentage of its value; so far as his office ws concerned there had never been any concerted effort to tax property in any other manner than as provided by law, etc.

Book of instructions issued by the Comptroller-General during each of the years 1911, 1914, 1915, 1916, 1917, 1918, and 1921, (P. 245) each of which urged upon the Tax Receivers to exret their best efforts to compel a return of stocks and bonds in foreign corporations and to thereupon tax the same at its fair market value, etc.

H. J. Fulbright, State Tax Commissioner (P. 246) swore he was familiar with the method of taxing property in Georgia; that there was no uniform, systematic method existing among the tax officials of the State whereby property was assessed at any per cent. of its value, but where it was returned as being worth ten thousand dollars, the same was assessed at 100 per cent.; that the rate of taxation throughout the State was uniform and applied to all property; that there may have been a number of tax defaulters in the State—persons who did not make any returns of their property, or when making a return, did not disclose all of their property for taxation, but none of these practices where

inaugurated by the taxing officials of the State; nor were such practices encouraged by them; that the tax officials could not possibly know, even approximately, the number of shares of stocks and bonds concealed and not returned and taxed, that he knew of no uniform, systematic, practice of the taxing officials of the State allowing stocks and bonds where they knew of their existence to escape taxation; that one of the troubles that deponent and all other tax officials of the State had to contend with was the failure of the tax payers to disclose their intangible property; that when it was disclosed or came to light, the same was assessed in like manner as all other property; that there was no uniform, systematic discrimination practiced by the Tax Receivers of the State in taxing one kind of property at one rate and another kind at a different rate; that the Tax Receivers over the State could not know whether the tax payers were telling the truth when swearing to their tax returns; that instead of there being any uniform, systematic, rule of discrimination practiced by the tax officials of the State, if such did exist, the same was due to the tax payers themselves, and not to the tax laws, or to the acts of the tax officials. (Print page 246).

Also eighty-five affidavits (P. 247-9) from as many separate Tax Receivers of eighty-five counties from all over the State in substance as follows:

That they had always sought to carry out the instructions of the Comptroller-General touching the assessments of stocks and bonds in foreign corporations at their fair market value as far as it had been in their power to do so; that they had no knowledge of any such property, nor the owners thereon, which had been withheld from taxation by the owners thereof; that they knew of no uniform, systematic rule in force in the State whereby the Tax Receiver had uniformly assessed such property at any percentage of its value and to the best of their knowledge such a system did not exist.

Pending a hearing on the merits in the lower court, which took place on September 23, 1922, complainant paid an amount as

figured upon the award of said Board of Arbitration, called into existence by said Callaway, Executor, and which resulted in the litigation referred to, to the Tax Collector of Richmond County, and set this fact up by amendment to his bill, (Print page 82). The Court below took the case under advisement, and on June 25, 1923 thereafter handed down the decree from which this appeal was taken.

ASSIGNMENTS OF ERROR

The several assignments of error as appear in the record touching the admissibility of complainant's evidence (Print pages 255-283) have been set out in detail hereinbefore immediately following an abstract of such evidence, and we shall not repeat the same here. There are also several assignments of error in the record on the overruling of the motion to dismiss (Print 250-252); and six general assignments of error (Print 280-283) which go to the case as a whole, but in view of the fact that in the formulation of the several questions which the case presents for this court's consideration, and the several legal propositions into which these questions resolve themselves, we have epitomized these assignments of error, which sets out the same sufficiently clear for an understanding thereof, and we shall not repeat them here, they will be set forth in detail in the argument of each assignment of error.

We now proceed to a discussion of these questions, which envelope all the assignments of error in the record in this court, upon which we rely for a reversal of the decree of the lower court.

LAW AND ARGUMENT

Before entering upon a discussion of the several questions we shall give a short outline of Georgia's tax laws.

That the right of taxation in Georgia is a sovereign right, inalienable, indestructible, and must be according to fair market value,—has been

(a) Ordained by the Constitution;

(b) Prescribed by Statute; and,

(c) Declared by Judicial Construction.

"Constitution"

Section 6462 of the Code provides that,

"The right of taxation is a sovereign right, inalienable indestructible, is the life of the State, and rightfully belongs to the people in all republican governments, and neither the General Assembly, nor any nor all other departments of the government established by this Constitution, shall ever have the authority to irrevocably give, grant, limit, or restrain this right; and all laws, grants, contracts, and all other acts whatsoever, by said government or any department thereof, to effect any of these purposes, shall be and are hereby declared to be null and void for every purpose whatsoever; and said right of taxation shall always be under the complete control of, and revocable by, the State, notwithstanding any gift, grant, or contract, whatsoever by the General Assembly".

Section 6553, declares:

"All taxes shall be uniform upon the same class of subjects, and *ad valorem* on all property subject to be taxed within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws, etc."

Section 6554 declared:

"The General Assembly may, by law, exempt from taxation all public property; places of religious worship or burial; all institutions of purely public charity; all buildings erected for and used as a college, incorporated academy, or other seminary of learning, the real and personal estate of any public library, and that of any other literary association, used by or connected with such library; all books and philosophical, apparatus; and all paintings and statuary of any company or association, kept in a public hall, and not held as merchandise or for purposes of sale or gain; Provided, the property so exempted be not used for purposes of private or corporate profit or income. (The General Assembly shall further, have power to exempt

from taxation, farm products, including baled cotton, grown in this State, and remaining in the hands of the producer, but not longer than for the year next after their production.")

Section 6556 declared that:

"All laws exempting property from taxation other than the property herein enumerated, shall be void."

"Statutes"

Section 1000 of the Code declares, that:

"No county authorities shall exempt from taxation, any manufactury, industry, enterprise or any property of any kind, not now exempt by law."

Section 1001, declares that,

"The tax receiver shall have all property, whether exempted by the county authorities or not, which is required by law to be returned for taxes in the several counties in this State, returned for taxation, and the tax collector shall collect the taxes upon such property."

Section 1002, is as follows:

"All real and personal estate, whether owned by individuals or corporations, resident or non-resident, is liable to taxation."

Section 1002-(a), provides,

"Personal property shall be construed, for the purposes of taxation, to include all goods, chattels, moneys, credits, and effects, whatsoever they may be, all ships, boats and vessels belonging to the inhabitants of this State, whether at home or abroad, and all capital invested therein; all money within or without the State due the person to be taxed; all stocks and securities in corporations in other States owned by citizens of this State unless exempt by the laws of the United States or of this State."

Section 1003, is as follows:

"In returning property for taxes, all property shall be returned at its value, promissory notes, accounts, judgments, mortgages, liens of all kinds, and choses-in-action

shall be given in at *their value* whether solvent or partially solvent."

Section 1004, defines "fair market value" as follows:

"The intent and purpose of the tax laws of this State is to have all property and subject of taxation assessed at the value which would be realized therefrom by cash sale, as such property and subjects are usually sold, but not by forced sale thereof, and the words *'fair market value'* when used in the tax laws, shall be held and deemed to mean what the property and subjects would bring at cash sale when sold in such manner as such property and subjects are usually sold."

Section 1010, declares that,

"All property or other thing of value, subject to taxation must be given in by the tax payers as hereinafter set forth, at *its fair market value*, and must be taxed *according to its value* on an assessment to be made by the Governor, with the assistance of the Comptroller General."

Section 1016 of the Code prescribes that,

"*Bonds*, notes, or *other obligations* for money, *on persons in other States, or bonds or corporations of other States*, and shipping, are the subjects of return and taxation in this State."

Taxable dates—how fixed, Code of 1895, Section 827:

The foregoing section covered the manner of fixing the dates on which the State had a lien for taxes*for the years* 1911 *and* 1912, and were as follows: *For* 1911, *February* 1st, and *for* 1912, January 31st.

Code of 1910, Sec. 1116 (f) is in part os follows:

"The individual returns made by taxpayers to the tax receiver, shall be for property held and subject to taxation on the first day of January, previously."

The taxable date for the years 1913 to 1917, both inclusive, was as of *January the first*. It was on these dates alone that the State had any lien for taxes. The Act of 1918 which was in force when the assessments in this case were made, is copied in

full above on page 19. Also Act 1910, page 27, Act 1908 and 1913 copied above pages 22 and 25.

"JUDICIAL CONSTRUCTION"

"The present Constitution requires that *all property* of every nature whatsoever within the territorial limits of the State shall be taxed, except such as the constitution expressly authorizes the General Assembly to exempt from taxation."

Georgia *Railroad* & *Banking* Co. vs *Wright*, 125 *Ga.*, 589.

Atlanta National Bldg. & *Loan Association vs. Stewart*, 109 *Ga.*, 80.

Such a construction of the State Constitution and laws of Georgia has been so held by this Court in the following language:

"The *Georgia Constitution requires the taxation* of all property subject to be taxed in Georgia----at least, *all property which can be come at in any way..'*

Wright vs. Louisville N *Nashville R. R. Co.* 195 *U. S.*, 219, 49 *L. E.* 167.

With the foregoing brief summary of the tax laws of Georgia, we shall now proceed to discuss the several assignments of error in the order named.

I.

DID THE COURT ERR IN OVERRULING APPELLANTS MOTION TO DISMISS IN THE NATURE OF A DEMURRER?

(a) Complainant having failed to avail himself of the opportunties to raise the issues he now raises in the State Court litigation and having failed to exhaust his statutory remedy as prescribed by *the Act of* 1918, *page* 232, *of the General Assembly of Georgia*, (quoted in full hereinabove on page 19), *the bill contained no equity.*

"That suits in equity will not be sustained in any case where a plain, adequate, and complete remedy may be had at law is de-

clared by Statute (Judicial Code, Sec. 292), and established by decisions of this court so numerous that citation is not necessary" to sustain the assertion.*Georgia vs. Chattanooga*, 263 *U. S.*, page ....., 68 L. E., 399.

In the case of *Keokuk & Hamilton Bridge Co. vs. Fred Salm*, 258 *U. S.*, 122, 66 *L. E.*, 496, the second head note is as follows:

> "2. No case for equitable relief is presented by a bill which seeks to enjoin the collection of a tax challenged under U. S. Const. 14th Amend., as based upon discriminatory overvaluation, where the *State law* affords ample opportunity to question the amount and the validity of the assessment, both before administrative tribunals and *in the State Courts.*"

Shelton vs. Platt, 139 U. S., 591, 35 *L. E.* 273;

Altchul vs. Gittings, 86 Fed., 200, and many other cases of like import, but we shall not lengthen our brief by a further citation thereof.

The remedy prescribed by the Act of 1918, page 232, was strictly a statutory remedy.

The Supreme Court of Georgia in its decision of March 22, 1922, (152 Ga., 871) attached to the record introduced by complainant set out on print pages 176-181, said:

> "The assessment of the property for taxation, involved in this case, having been made in July, 1919, and the arbitration proceeding as to such assessments having been had in September of that year, the above quoted provisions of the Act of 1918 provided the *remedy*, that is, by petition in equity, by the dissatisfied *delinquent tax payer*, for having such assessments corrected because excessive. The procedure for arbitration of tax assessments claimed by delinquents to be excessive, in force prior to the enactment of the Act of 1918, are by it repealed."

In this ruling the court below concurred. (P. 196).

This decision fixed "the meaning of the State legislation", and the same meaning will be given thereto by this Court. *Knights*

of Pythias vs. Meyer, Adv. Opinion, United States Supreme Court 68 L. E., 487.

The assessments were made and notice given to Callaway on July 28th, 1919. The present bill in equity was not filed until *March 23, 1922*, practically *three years after the assessments* had been made and *Callaway notified thereof*. It is true Callaway did *raise* the *question* of *excessiveness*, but *he did not raise it before the proper tribunal* as allowed by the law at that time. The Supreme Court of Georgia said that he had no right to demand an arbitration touching said assessments, and it is submitted that likewise Steed, Tax Receiver, had no authority to agree thereto. So if Callaway chose not to raise the question of excessiveness as the statute provided and allowed the assessments to become final against him he has no cause for complaint. The Act of 1910 quoted above on page 22, provided that the assessments should be "final unless the tax payer within twenty days after receiving such notice raise the question that it is excessive". This provision the Act of 1918 did not repeal. The time fixed by law in which to raise the question of excessiveness has been 20 days for many years in Georgia. See *Dubignon vs. Brunswick* 106 *Ga.*, 317.

Callaway *recognized that he was limited to twenty days* from receiving notice of the assessments in which to raise the question of excessiveness, His demand for arbitration was as follows:

"Augusta, Ga., August 7th, 1919.

"Hon. Clifford A. Steed, Tax Receiver of Richmond County,

Augusta, Georgia.

In Re: Estate of J. B. White.

Dear Sir:

"I am writing as the Executor of the Will of J. B. White to notify you that I am dissatisfied with the assessments which you made upon the personal property of the Estate of J. B. White for the years 1911, 1912, 1913, 1914, 1915, 1916 and 1917, under date of July 28th, 1919, and exer-

cising the privilege given me by law, now *within twenty days from receiving* the notice from you of said assessments, I hereby request that said assessments be referred to arbitration, as provided by law, and I hereby notify you that the arbitrator chosen and selected by me for such arbitration is Percy E. May.

"Please notify me of the name of your arbitrator as soon as practicable.

"Very truly yours,

"E. H. Callaway, Executorof the Will of J. B. White."

Callaway knew when he demanded arbitration that in the total addition of Steed's assessment were included the National Bank Stock and the Southwestern Railroad Company Stock, because Steed, tax receiver, in notifying him of the assessments made by him, attached to such notice a list of the securities he had assessed and in it there appeared this explanation: "Stocks Not Taxed and Deducted". Then followed a list of the National Bank stock and the Southwestern Railroad Company stock for the years 1911 to 1917 both inclusive, through which was run a line. (See Print page 28-29).

With this explanation made by the Assessing officer, can it be imagined for a moment that such addition would not have been corrected instantly upon the same being called to the attention of the tax receiver? We apprehend not. This is demonstrated by the record in this case (Print 59-60 and 239).

The responsibility of returning the property for taxation durinng the years 1911 to 1917 rested upon White during his life, and had he done so and had any change in the valuation fixed by him been made by the taxing authorities, he would have had the opportunity to resort to the following statutory administrative remedies.

(a) *During the years* 1911-1912—*Act of* 1910, *page 27, quoted above, by arbitration.*

(b) *During* 1913, 1914, 1915, 1916 *and* 1917, under the equal*ization law of* 1913, *page* 126, quoted above.

Yet, White chose to disregard these opportunities during his life.

It will be noted that the Act of 1913 at page 132, was applicable to current years only. We quote from *State vs. Callaway*, 150 Ga., 235, "The latter (Act of 1913) could have had no application to the taxation of property for any previous years, but only to the current year". So in order for White to have come under this Act he should have made a return of his property and the Board created thereunder, must have made some change in the valuations fixed by him.

Of course Callaway, his executor, could claim no right thereunder.—He made no return which was changed by such Board during 1911 to 1917, nor did that Board have anything to do with Steed's assessments for previous years upon omitted property—it made no change and had no jurisdiction to make any change in such assessments.

Callaway, Executor had the following opportunities to raise the issues he seeks to raise by this Bill:

(a) In the Mandamus Proceedings; (Richmond County vs. Steed, 150 Ga., page 229).

(b) In the Injunction Proceedings; (State vs. Callaway, 150 Ga., page 235).

(c) In the Proceedings Brought to set aside award; (State vs. Callaway, 152 Ga., 871).

All of which proceedings were in the superior court of Richmond County, and it was that court to which the Act of 1918, page 232, had remanded delinquent tax payers; under the law of Georgia, even before the Act of 1908, an illegal tax could have been enjoined. Lanham & Sons Company vs. City of Rome, 136 Ga., 398; see also Security Trust & Savings Vault Co. vs. City of Lexington, 203 U. S., 323, 51 L. E., 204.

(d) By direct Proceedings under the Act of 1918, page 232, in the superior court of Richmond County, of all issues both of excessiveness or taxability.

Yet he chose to, and did shun all these opportunities, and, *disregarding the Act of* 1918, filed the present bill.

Date of Assessments, July 28, 1919;—*Date of Demand for Arbitration, August* 7, 1919;—*Date of Presenting this Bill, March* 23, 1922;—nearly *three years* after he should have raised such issues as he did raise.

It is submitted that Callaway, Executor, *could not disregard all these opportunities and also the Act of* 1918*; split up his demands by first forcing an arbitration, and cause some three or four years of litigation with reference thereto, and then go into the Federal Court and raise anew the question of excessiveness, and for the first time raise the question of non-taxability. He should have done both upon the receipt by him of the notice of the assessments made by Steed, Tax Receiver on July* 28, 1919.

What right had Callaway, Executor to dominate a State's assessing officer and succeed in having that officer cause a State and its other political subdivisions, the beneficiaries of the taxes in question, to resort to the interminable litigation in the manner as shown by this record; and then complain that he has been denied his constitutional rights under the Federal Constitution? Litigation touching these assessments began in December 1918, six years ago. We assert none. Upon him rests the full responsibility.

> "Where one is made a party to a proceeding under the drainage laws of this State (Georgia), in order to create a drainage district and to create drainage commissioners and make assesssments against the land owners of the property to be drained, and such party fails and refuses to appear and object to the creation of the drainage district and appointment of drainage commissioners, who subsequently make assessments against the land owners for improvements made on the land, or, *having objected*, fails to prosecute the case on objections filed, which are dismissed, or after the assessment, *fails* to *avail himself* of the *right*

of *appeal* as provided in the *drainage Act of* 1911, such *land owner will not be heard to set up any defense which he had when and before the assessment was made."*

Goolsby vs. Board of Drainage Commissioners, 119 *S. E.,* 645 (9).

In the case of *McGreagor vs. Hogan,* 263 *U. S.* 234, this court said:

"McGregor declined to avail himself of the arbitration to which the Act entitled him, and the assessment that had been made by the Board of Assessors was thus rendered final and conclusive not by the force of the Act itself, but *by his own deliberate default.*

"Having thus failed to avail himself of the hearing granted by the Act, he was properly held by the Supreme Court of Georgia to have *no just ground of complaint."*

Complainant failed to follow the administrative remedy prescribed by Georgia laws and not having done so, has no cause of complaint.

First National Bank vs. Board of County Commissioners of *Weld County,* reported in Advanced Sheets, 68 L. E., 406, and authorities cited therein.
See also *Glidden V. Harrington* 189 U. S. at. 259, 47 L. E. 798 *Keokuk & Hamilton Bridge Co. vs. Salm,* 258 U. S., 122, 66 L. E., 496; *Canadian Northern Pacific Rwy. Co. vs. Eggen,* 252 U. S., 553, 64 L. E., 713; *Graham vs. Dupont* 262 U. S., 234, 67 L. E. 965.

Appellants contend that under the principal ruled in the authorities above cited, there was no equity in complainant's bill, and the same should have been dismissed.

The Supreme Court of Georgia has held that where the law required a tax receiver to act within a certain time in rejecting a tax payer's return, if dissatisfied with a return made by the tax payer, in that case thirty days, he must act within that time or the State is bound by the valuation placed upon the tax payer's prop-

erty in his return. Such ruling was made in the case of Bohler vs. Verdery, 92 Ga., 718. That was a case where a local law was passed touching the assessment of property in Richmond County and the Board created by this Act increased the valuation of property which had been placed thereon by the tax payer in his return and executions were issued on such valuation. These executions were sought to be enjoined, and on a trial in the lower court the act under which such increase in valuation was made was conceded to be illegal. The law codified in the then Code of Georgia as Section 839 thereof, required that when a tax receiver was dissatisfied with a return of a tax payer he should upon such return being made, immediately increase such values; or, if not done immediately, that he should within thirty days reject such returns and then assess. When the case came on for a hearing, such thirty days had elapsed and the tax receiver prayed to be made a party therein, alleging that had it not been that he was of the opinion that the local act prevented him fram doing so he would have rejected such returns and assessed such property in accordance with the provisions of such Code Section, and prayed that the tax payer be compelled to submit the question of said assessment to arbitration, etc. In passing on this contention, the Supreme Court of Georgia, said:

> "The authority of the tax receiver to assess property where a return has been made is derived from section 839 of the code, and is limited to the time prescribed in that section. The language of the section is as follows: 'Each return shall be scrutinized carefully by the tax receiver, and if, in his judgment, he shall find the property embraced in the return, or any portion of it, returned below its value, he shall assess the value at once or within thirty days thereafter.' The courts cannot enlarge or extend the scope of the statute by granting further time if the tax receiver fails to act within the time prescribed; nor can they, at his instance, require the tax payer to submit to an assessment by arbitrators, under section 840 of the code. Certainly the fact that the tax receiver *believed* or *relied* upon the *belief of others* that an invalid local statute was valid and superseded the law above referred to, so far as the particular county was concerned, and that his failure to

act was due to this cause, could not give the court any power in the matter. The principles which authorize a court of equity relieve against mistake have no application to the case. The tax receiver is *bound to know the law regulating his official duty;* and for *his error* of judgment in reference thereto, no responsibility can *attach* to the *tax payer.*"

Now to apply the principal ruled above in the instant case. If a State cannot force one of its tax payers to submit to an arbitration how can a tax payer compel the State's officer to do so when the laws of the State give him no such right.

Furthermore, there is another principal above ruled which applies with equal force. There the State's officer *failed to act within the time provided,* and it, the State, was precluded thereby. Is it any harsher to apply the same rule to a tax payer. If Callaway, misjudged the law and selected the wrong forum, and while engaged in this effort allowed the time to elapse in which he should have raised the "issue of excessiveness" in the proper tribunal within twenty days from receiving notice of the assessments and thus allowed the assessments to become final, we ask, Who has he to blame? *Dubignon vs. Brunswick,* 106 *Ga.* 317.

We again call the court's attention to the fact that Callaway in the present bill contended that certain National Bank stock and certain stock in the Southwestern Railway Company was assessed along with other property, which was not taxable. *This fact he knew, if true, when the assessments were made. If so, he was bound to raise all* questions at one time; the *very statute* under which he claimed the right of arbitration *required* that the question of *non-taxability* of property which had been assessed be raised by *petition to the superior court.*

Callaway, in his letter of August 7, 1919, demanding arbitration, said: "*Now within twenty days* from receiving the notice from you of said assessments, I hereby request that said assessments be referred to arbitration, as provided by law." He did not raise the question of non-taxability at all, and raised the ques-

tion of excessiveness in the wrong tribunal, by his own neglect he allowed the assessments to become final. Furthermore;

(b) Appellee had no title to real property which could be *clouded by the tax executions; no multiplicity of suits was alleged; nor did he allege any facts which showed irreparable injury.*

The complainant in this case failed to allege that complainant was in possession of, or had title to any property which could be clouded by the tax fi fas. sought to be enjoined.

The mere fact that a tax may be illegal or unconstitutional does not give a person the right to come into a Federal Court of Equity to enjoin the same.

Milwaukee vs. Koeffler, 116 *U. S.,* 219, 29 *L. E.,* 612.

After Callaway had assented to the legacies passing under the Will of White, title to all land of said White passed to the trustees under said Will, as completely against the Estate and said Executor as though it had never formed any part of the Estate.

Watkins vs. Gilmore, 121 *Ga.,* 488.

Therefore Callaway could not claim any relief by reason of the fact that the executions might cast a cloud upon the *title* of the *trustees* under said Will.

If the land had been levied on, he could not have filed a claim thereto. *State vs. Salade,* 111 *Ga.,* 700.

And "an injunction, cannot be granted to private individuals to avert the sale for taxes of the property of others, whether exempt from taxation or not." *Railroad Company vs. Patterson* 154 *U. S.,* 134, 38 *L. E.,* 934.

In the case of *Indiana Mfg. Co. vs. Koekne,* 188 U. S., 681, 47 L. E., 651, it was held that, an averment that an assessment upon the capital stock and franchises of a corporation, constituted a cloud upon the title, was not sufficient to sustain a bill in equity seeking to enjoin the collection of a tax as illegal, where there was no allegation that the corporation owned any real property.

In the instant case, it is confessedly true, that Callaway owned no real estate upon which a cloud could be cast by any tax execution.

And under the ruling in the case of Dows vs. Chicago 11 Wal. 108, 20 L. E. 65, although the tax executions may have been illegal and void, but the mere illegality of the same and the threatended sale of the personal property or shares of stock of the estate of said White constituted no ground within itself for injunction.

The Court said:

> "There must be some special circumstances attending a threatened injury of this kind, distinguishing it from a common trespass and bringing the case under some recognized head of equity jurisdiction before the preventive remedy of injunction can be invoked. It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments; and it is of the utnost importance to all of them that the *modes adopted* to enforce the taxes levied should be interferred with as little as possible. Any delay in the proceedings of the officers upon whom the duty is devolved of collecting the taxes may derange the operations of government, and thereby cause serious detriment to the Government. No court of equity will therefore allow its injunction to issue to restrain their action, except where it may be necessary to protect the rights of the of the citizens whose property is taxed, and he has no adequate remedy by ordinary process of the law. It must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or, where the property is real estate, throw a cloud upon the title of the *complainant*."

For this reason it is insisted that the lower court should have dismissed the complainant and refused the relief sought.

Moreover;

(c) *Complainant Failed to do that equity which would entitle him to be heard.*

Not until after this case had been argued at length did complainant ever offer or tender unqualifiedly payment of any tax but sought injunctive relief before doing so.

This court has unqualifiedly laid down the rule that before a complaining tax payer can be heard in a court of equity, he must do equity by paying that which he admits to be due. He cannot ask equity and then offer to do equity,—but must first offer to do equity before asking for the same.

Railroad Tax cases, 92 *U. S.*, 575-618, 23 *L. E.*, 663.

In the case of *German National Bank vs. Kimball*, 103 U. S., 732, 26 *L. E.*, 469, this court said:

> "We have announced more than once that it is the established rule of this court that no one can be permitted to go into a court of equity to enjoin the collection of a tax until he has shown himself entitled to the aid of the court by paying so much of the tax assessed against him as it can be plainly seen he ought to pay. That he shall not be permitted, because his tax is in excess of what is just and lawful, to screen himself from paying any tax at all until the precise amount which he ought to pay is ascertained by a court of equity. That the owner of property liable to taxation is bound to contribute his lawful share to the current expenses of government and cannot throw that share on others *while he engages in an expensive and protracted litigation* to ascertain that the amount which he is assessed, is or is not a few dollars more than it ought to be. But that before he asks this exact and scrupulons justice he must first do equity by paying so much as it is clear he ought to pay, and contest and delay only the remainder."

Huntington vs. Palmer 8 *Fed., page* 449.

Los Angelas County vs. Ballerino, 32 *Pac.*, 581.

Pittsburg C. C. & St. R. Co. vs. Board of Public Works, 172 *U. S.*, 32-38, 43 *L. E.*, 354.

Western Union Telegraph Co. vs. Missouri ex rel. Gottlieb, 190 *U. S.* 412, 47 *L. E.*, 1116.

People's National Bank of Linchburg vs. Marye, 191 *U. S.*, 272, 48 *L. E.*, 180.

It is therefore submitted that *until complainant paid that which he conceded, he had no cause of action in equity*,—he should have offered to do equity in the first instance. *He cannot begin litigation without a cause of action in him*, and then when it dawns upon him that he *has none* by reason of a failure to do that equity which would entitle him to be heard, *and then for the first* time *offer to do equity; then for the first time acquire a cause of action. Even that which he did pay on September* 25, 1922 *should have been paid September* 5, 1919, as illustrated by the decree of the lower court (Print page 199) *requiring* the *payment* of *interest from* that *date*, so confessedly he had no cause to complain in equity as he did. If he admitted this amount, he should have paid the same, before seeking equity.

Hollingsworth vs. Flint, 101 *U. S.*, 591, 25 *L. E.*, 1028.

Wadley, Jones & Co. vs. Jones, 55 *Ga.*, 329.

Mason vs. Atlanta Fire Co., 70 *Ga.*, 604.

Baker vs. Tillman, 84 *Ga.*, 401.

The mere fact of;

(d) *The inclusion of National Bank stock, did not authorize the court to retain jurisdiction of this case.*

The mere illegality of a tax or its unconstitutionality does not of itself give a person the right to go into a Federal Court of equity. Even if National Bank stock was included along with $1,300,000 of other property would be no ground of Federal Equitable Jurisdiction.

Union Pacific R. R. Co. vs. Board of Commissioners, 217 *Fed., page* 540.

Milwaukee vs. Koeffler, 116 *U. S.*, 219, 29 *L. E.*, 612.

Shelton vs. Platt, 139 *U. S.*, 591, 35 *L. E.*, 273.

Singer Sewing Machine Company vs. Benedict, 229 *U. S.*, 481, 57 L. E., 1288.

Davidson vs. Board of Admrs. of New Orleans, 96 *U. S.*, 105, 24 L. E., 616.

We might multiply the citation of authority in substantiation of the foregoing propositions of law but to do so would be an unnecessary lengthening of this breif. We therefore rest the question of whether or not the court failed to sustain appellants motion to dismiss in the nature of a demurrer on this point upon the authorities hereinabove.

(e) *A Federal District Court has no jurisdiction to review or adjudicate the validity or invalidity of the decision of the State Supreme Court in relation to the arbitration proceedings, as prayed by complainant.*

Prior to the filing of this bill by Complainant the State had filed a bill in equity in the State Court to set aside an award of a Board of Arbitration touching the assessments of omitted property for back taxes, upon the ground that such award was void. Complainant herein, defendant therein, was made a party, and interposed a general demurrer upon the ground that such petition set forth no equitable cause of action, that there was no right in the State to sue, etc. This demurrer the lower court sustained without stating upon what ground such judgment was rendered. To this ruling the State sued out a writ of error to the State Supreme Court, which affirmed the judgment of the lower court. There were three separate opinions by the several Justices who comprised the Court as then constituted. The two Justices who wrote the main opinion, Fish and Hines, held that:

> "1. The assessment of the property for taxation, involved in this case, having been made in July, 1919, and the arbitration proceedings as to such assessments having been had in September of that year, the above-quoted provisions of the Act of 1918 provided the remedy, that is, by petition in equity, by the dissatisfied delinquent tax payer, for having such assessments corrected because ex-

cessive. The procedure for arbitration of tax assessments claimed by delinquents to be excessive, *in force prior to the enactment of the act of* 1918, *are by it repealed. It follows, therefore, that the arbitration proceedings for the assessments of property for taxation here involved, and the award made by the arbitrators, were wholly void; and the petition now under review for the purpose of setting aside the void award was unnecessary, and the judge of the superior court did not err in sustaining the demurrer to the petition and dismissing the same*..... This being so, the complainants have a *full and complete remedy at law.* This void award did not stand in the way, the Tax collector can issue his executions based upon the assessments made by the tax receiver and proceed to to collect the taxes thereunder. If the executor of the delinquent tax payer is dissatisfied with these assessments, on the ground that they are excessive, he has his remedy under this act. We concur in the judgment of affirmance solely on the ground that the award was void, and equity will not undertake to set aside a void proceeding which does not stand in the way of the enforcement of the payment of taxes, based upon these assessments by executions, levies and sales." (P. 175).

Beck justice, in his concurring opinion stated:

"I concur in the judgment of affirmance in this case; though I doubt whether the provisions of the Act of 1918, declaring when the delinquent tax payer may resort to equity is applicable.....I also concur in the judgment of affirmance *on the ground that equity will not afford the relief here sought, as petitioners have a statutory remedy as pointed out above,* (meaning that as pointed out by the judges who wrote the main opinion), even if the Act of 1918 is applicable to this case." (P. 176).

The other Justice Atkinson also concurred, stating that in his opinion the Act of 1918 did not apply and that such award was final in the absence of fraud, etc., (Print page 176). No writ of error was sued out by complainant to the Supreme Court of the United States from this decision.

Instead of so reviewing such decision, complainant, the delinquent tax payer, and a defendant in said State Court proceed-

ings, filed this bill in equity in the District Court of the United States, in which he prayed that the amount of taxes which he as such delinquent tax payer should be required to pay, "be, by "decree of this honorable court fixed finally and conclusively at "the amounts respectfully ascertained, named, and determined in "the award of said Board of Arbitrators etc." Subsequently by amendment, he plead the same as res adjudicata.

Such Bill, it is submitted, is an effort to have said District Court review the decision of a State Supreme Court. This cannot be done. See *Rooker vs. Fidelity Trust Company,* 263 U. S. 413.

Counsel, for complainant below, in a brief filed in response to a motion to dismiss, etc., heretofore made in this case, stated on this subject as follows (page 10).

> "This decision (having reference to the State Supreme "Court decision above-quoted) was rendered Saturday "night, March 4th, the last day of the term, and the tele-'gram from the Supreme Court announcing the affirmance "of the decision did not give counsel for the Executor in "that case *any opportunity to learn of the obiter opinion* "of Messrs. Hines and Fish, nor to ask for and file an "application for rehearing before the whole court, under "the rules of practice before the Supreme Court of "Georgia."

While this statement is outside the record,—nevertheless it shows that complainant's real intention was to review the State Court decision in the Federal District Court. Further, his contention that the opinion of the Justices who wrote the main decision, Fish and Hines, was obiter,—is wholly untenable, but the same contained the law of the case. (See *Union Pacific vs. Mason City,* 199 *U. S.,* 160, 50 *L. E.,* 134. *United States vs. Title Ins. & Trust Co., Adv Opinions U. S. Supreme Court,* 68 *L. E.,* 671. *Boyle vs. Zachary,* 6 *Pet.,* 348, *L. E.,* 423. *Central of*

Georgia Ry. Co. vs. Gwines, 153, *Ga.* 606, 7 *C. L., page* 1005. *Chicago vs. Board Supervisors*, 18B *Fed.*, 291. *Atlantic Coast Line R. Co. vs. Holliday*, 73 *Fla.*, 269, (17) 74 *So.*, 479), which was that the Act of 1918 repealed the remedy by arbitration, that previously existed, that the award was void and that such Act prescribed an adequate remedy at law for all parties, and therefore equity would not intervene to set aside an utterly void award.

INADMISSIBILITY OF COMPLAINANT'S EVIDENCE

II.

Note —In order to argue the several assignments or error on the inadmissibility of complainant's evidence we will be forced to repeat to a certain extent.

DID THE COURT ERR IN ADMITTING COMPLAINANT'S EVIDENCE OVER THE OBJECTION URGED THERETO:

An answer to this question will necessitate a consideration of the following legal propositions:

> (a) *Complainant failed to do that equity which would have entitled him to be heard and not having done so, none of said evidence should have been received.*

Having discussed this question under "C" of our argument on the motion to dismiss, we shall not repeat the same.

We would however, call the Court's attention to the language of the lower court on page 199 of the print, to wit:

> *"However, the taxes owing should have been tendered without condition. The amount tendered on September 5, 1919, was $27,980.88 and was upon condition that it was in full payment of the above taxes and interest as calculated upon the assessments rendered by the Board of Arbitration on September 2nd, 1919. On September 25, 1922, the same amount was paid by the executor of the estate of White unconditionally.*

> *"Under the view herein expressed I am of the opinion that there must (should) have been paid interest on such amount,—$27,980.88—for the period from September 5, 1919, to September 22, 1922, and so hold.*
>
> *"Except as to the amount of such interest, the executions attacked in this case are cancelled, and their enforcement for any other amount is enjoined."* (Print page 199).

Counsel, in speaking of the tender made on page 128 of their brief filed on motion to dismiss said "The language cannot be construed as meaning *in full payment of all taxes for said years due by the Estate of White.*' This demonstrates that complainant failed to do equity. If White owed other taxes, which of course he did, these should have been paid or tendered unconditionally. In an effort to show clean hands he demonstrates the contrary.

This being true it is respectfully submitted that complainant's evidence should have been rejected.

> (b) *Record of suits from the State Courts* (P. 85--181) *involving arbitration proceedings and award* (P. 132) *of such arbitration board being void, were, inadmissible over objections urged against it,* (P. 256, page 39 Supra).

Clearly this evidence was inadmissible; it was wholly without probative value. This award had been declared "null and void" by the lower Court (P. 198) and by the State Supreme Court in the following language:

> *"The arbitration proceedings were null and void under the Act of August* 17, 1918." (Print page 176-7).

And this decision *fixed* the "meaning" of the *Act of* 1918, page 232, and is binding on theFederal Court. (Knights of Pythias vs. Meyer, 68 L. E., 486). In other words, this construction by the Georgia Court was as if the Act had stated in so many words *that an award held subsequent to this Act shall be void.*

But it is insisted that this language was obiter. This position is refuted by the authorities cited under par. (e) of our argument on motion to dismiss page 86 supra.

This being true, it was *not admissible as evidence on the question of discrimination*, and its "investigations and conclusion (*could not*) be properly used as an aid", in arriving at what amount of taxes should be required of this Estate, and by it determine to what extent complainant had been discriminated against.

Freeman on Judgments, 4th Edition, Section 170, sayss

> *"A void judgment is, in legal effect, no judgment.* By it *no rights are divested. From it no rights can be obtained* Being *worthless in itself, all proceedings founded upon it are equally worthless.* It neither binds nor bars any one. All acts performed under it, and all claims flowing out of it are "invalid".

This court is speaking through Mr. Justice Joseph R. Lamar, (in the case of *Hopkins vs. Clemson's Agricultural College*, 221 *U. S.*, 636, 55 *L. E.*, 890, *on page* 644 *U. S., and* 895 *L. E.*), of the effect of a void act had this to say:

> "But a void act is neither a law nor a command. It is a nullity. It confers no authority. It affords no protection."

In the case of Russell vs. First National Bank, 56 Southern, 868, the supreme court of Alabama in passing upon an assignment of error to the admissibility of a deed which the evidence showed without dispute had not been signed by the person whose name appeared thereon, or acknowledged as required by law, and was therefore "absolutely void", said:

> "A void thing is, in legal effect, no thing and has no effect whatever. Words and Phrases, Vol. 8, page 7332. We are therefore of the opinion that the Court erred in permitting appellee to introduce the said deed in evidence."

It is respectfully submitted that the language quoted is peculiarly applicable to the instant case. *This award being "void" it was absolutely worthless and it was not proper for the lower court to admit it in evidence and then take into consideration its* "investigations and conclusions——as an aid" *in arriving at its judgment in other words in effect to adopt it as the decree of the Court.*

See *Wadley Southern Ry. Co. vs. Wright* 120 S. E. (Ga) 551.

Steed's Testimony (P 202, 153 and 255 and see page 41 Supra for assignments of error) Inadmissible.

The testimony of Steed, Tax Receiver, which tended to impeach his official acts in the premises was inadmissible.

It is submitted that it was altogether improper to subject this officer to an exanmination as was done in this instance as to how he made the assessments in question, or as to how he had made other assessments; and allow him to give evidence of such a character as would tend to impeach his official acts touching the assessments in question. Of course the object of the executor in eliciting this evidence was to try and show that Steed, Tax Receiver, had not theretofore done his duty by assessing property at its full value as required by law, and thus show discrimination against him. We submit that this evidence was wholly improper.

In 22 R. C. L. paragraph 147, page 474, it is said:

> "An officer when he performs an act, in the course of his official duty, cannot be heard to say what he intended thereby. The law attaches consequences to the act without reference to the private intention of the officer. He has no power to *explain away his legal acts, or their effect.* To do so would give effect to the intention of the officer rather than the law. And it is a familiar principle that a public officer making a return of his doings on a writ shall not be allowed to gainsay the truth of it."

Clearly to admit or consider Steed's testimony for the purpose of impeaching the assessments in question would be to violate these fundamental principles of law. It would be to allow any unscrupulous tax receiver to upset every assessment he might make and thus greatly embarrass the State in the collection of her revenues. Clearly this will not be done.

In the case of *Illinois Central R. R. Co. vs. Commonwealth,* 108 *S. W.* 245, on page 246, the Court said:

> "The defendant introduced on the trial, Samuel H. Stone, one of the Auditors of the State in the year 1898 and as

such, a member of the Board who made the assessment, upon which the suit is based. He testified on the trial, which took place, in October 6, 1905, in substance that although the board made the assessment and sent out notice of it and at the end of thirty days sent out the final notice of assessment, they were unwilling to force a conclusion because they were not sure of their ground and in the winter of 1899 they had a consultation with the railroads of the State, and in this consultation with the railroads in the year 1899 they agreed that the assessments then made against the Illinois Railroad should be in full, not only for that year but for the previous year."

In passing upon this testimony, the court said:

"The testimony of an assessor who makes an assessment can not be received after his term is out to show that he did not consider his assessment a valid act or final. The board made the assessments in the way that all other assessments were made. It gave notice of the assessment to the railroad company as required by statute and at the end of thirty days it gave notice as provided by the statute, that the assessment had become final. When this had been done the matter passed beyond the control of the board—No reliance could be placed in such proceedings if the validity of the record was made to depend upon the secret intentions of the assessing officer. The validity of their actions depends upon what they do, and not upon their undisclosed purposes."

The foregoing case was carried to the Supreme Court of the United States and the foregoing ruling affirmed. *Illinois Central Railroad vs. Kentucky*, 218 *U. S.*, 551, 54 *L. Ed.* 1147.

Here Steed was allowed to testify "we had a rule not to assess at full market value; in starting out where no arbitration was demanded, I would make the assessment at full market value, but whenever it got down to arbitration, I never made it at true market value, but would almost always take the first assessment and put it down, and if the parties forced me to an arbitration, would *settle* on some basis later on lower that the full market value" etc. (Print 202).

The very character of Steed's testimony indicates the wisdom of the rule. No one can read this testimony without being struck with the idea that Steed was vassillating. He was being hedged between his duty and the dominating influence of the Executor of a multimillionaire tax defaulter. And this record discloses that Callaway, Executor had been unrelenting in his effort to dominate Steed, Tax Receiver.

It is respectfully submitted that such an office should not be subjected to such examination.

In Allen vs. State, 155 Ga., 332, 116 S. E. 534, the Supreme Court of Georgia held that, "Statements by members of the jury which rendered a verdict finding the accused guilty on an indictment charging him with rape, to the effect that the bailiff in charge of the jury stated to them, 'You are not coming out of there until you make a verdict', is in the nature of evidence tending to impeach their verdict and jurors will not be heard thus to impeach their verdict."

After Steed had assessed the property in question, the matter "*passed beyond (his) control*" Illinois Central Ry. vs. Kentucky 218 U. S. 551) and he should not now be *heard to impeach his official acts by testifying that he did not intend his action to be final.* This is exactly what he did, for he said that in starting out he would assess at full market value, but if an arbitration was demanded he would settle on something less; nor can he testify as to his violating his duty by assessing property differently from the method required by law.

In *Chicago B & Q. R. Co. vs. Babcock*, 204. U. S., 585, 51 *L. E.* 636, *at page* 638, *it was said*:

> "When we turn to the evidence there is equal ground for criticism. The members of the board were called, including the Governor of the State, and submitted to an elaborate cross-examination with regard to the operation of their minds in valuing and taxing the roads. This was wholly improper. In this respect the case does not differ from that of a jury or an umpire, if we assume that the mem-

bers of the board were not entitled to the possibly higher immunity of a judge. Buccleuch vs. Metropolitan Bd. of Works, L. R. 5, H. L. 418, 433. Jurymen cannot be called, even on a motion for a new trial in the same case, to testify to the motives and influences that led to their verdict. Mattox vs. United States, 146 U. S., 140, 36 L. E., 917, 13 Sup. Ct. Rep. 50. So as to arbitrators. Buccleuch vs. Metrapolitan Bd. of Works, L. R. 5 H. L. 418, 457, 462. Similar reasoning was applied to a judge in Fayerweather vs. Ritch, 195 U. S. 276, 306, 307, 49 L. E., 193, 213, 214, 25 Sup. Ct. Rp. 58. A multitude of cases will be found collected in 4 Wigmore on Evidence, SS 2348, 2349. All the often-repeated reasons for the rule as to jurymen apply which redoubled force to the attempt by exhibiting on cross-examination the confusion of the members minds, to attack in another proceeding the judgment by a lay tribunal, which is intended, so far as may be, to be final, notwithstanding mistakeh of fact or law."

The foregoing case was approved in the case of *Newport Mining Company vs. Ironwood, (Mich.)*, 152 *N. W.* 1088, *holding* assessment by State Board of Tax Commissioners based upon valuation of mining made by experts including mineral value of land, cannot be impeached by testimony of member of Board.

Also in *Boston & M. R. R. Co. vs. State*, 76 *N. H.* 91, 79, *Atl.* 703, holding on appeal for abatement of taxes that members of State Board of Equalization cannot be inquired of as to operation of their minds in valuing railroads.

And again in *Eau Claire vs. Eau Claire Water Co.* 137 *Wis.* 529, 119, *N. W.* 560, holding that testimony of arbitrators cannot be used to impeach their award.

Under the foregoing rulings, it is submitted that this testimony should have been rejected.

(e) Clearly the affidavit of John W. Dickey (P 25 and 145-7) giving his opinion of the amount of stocks and bonds which he conceived were owned by tax payers in the Cities of Savannah, Macon and Atlanta, without giving the names of any such owners, or the value of such property as owned by them on any taxable

date, or without giving any figures or statistics or data, upon which it might be determined as to what was the value of all property in Richmond County, including such stocks and bonds on the several taxable dates for the years in question, and that the tax receiver of Richmond County knew thereof and deliberately refused to assess the same or did so at some specific percentage of its value, was clearly inadmissible for the purposes it was offered. (See P. 43 Supra for assignments of error thereon).

(f) Likewise was the affidavit of Rufus H. Brown (P. 59 and 147) inadmissible, which affidavit purported to give the amounts of money on deposit in the various banks of the City of Augusta for the years 1915, 1916, 1917, 1918 and 1919. It did not show any facts that even tended to prove any discrimination against the estate of J. B. White. (See Page 44 Supra for assignments of error).

(g) The next assignment of error deals with the admission in evidence of an affidavit of E. H. Callaway (203, 260 and 148) and a joint affidavit of James S. Bussey and Henry G. Howard, in which they gave the result of their findings touching the number of loan deeds appearing of record in the office of the Clerk of the Superior Court on the several dates mentioned, without giving the names of the owners of any such property on any taxable date, or the value thereof, or without stating any other data which tended to show discrimination, was not proper evidence to be received by the Court. (Assignments of Error page 45 Supra).

(h) The next assignment of error was as to the admission in evidence of an affidavit of E. H. Callaway,(P 261, and 152) complainant, dated August 23, 1919, stating the result of his examination of the Books of Inventory in the Office of the Ordinary of Richmond County, but which said affidavit failed to state by whom said property was owned, and whether the same was owned by any of the said decedents on any taxable date for the years in question, or that such information was known to the tax receiver of Richmond County, and that he deliberately and intentionally

refused to assess said property, or assessed the same at any percentage of its value, was no proof of discrimination against complainant of the character demanded by the rule laid down by the Federal Courts governing the character of evidence necessary to prove such fact, and to admit the same was palpably erroneous. (Assignment of error page 46 Supra).

(i) The next assignment of error deals with the reports of the Comptroller General (P 262 and 210) for the year 1911-1917, and also an extract from the report of the Comptroller-General for the year 1912 (P211); the first of which said reports gave merely the aggregate of stocks and bonds, which appeared to have been returned for taxation in the Counties of Bibb, Richmond, Chatham and Burke, and in the excerpt from the report of 1912 was contained a recital to the Governor of the Comptroller's idea of the tax machinery of the State of Georgia, in which he urged that some remedy be devised whereby intangible property might be disclosed and placed on the tax books, was certainly not proof of that discrimination which would impel a Federal Court of Equity to break down the tax system of a State. Thisreport did not even purport to give the actual market value of such property in the State, or any other property in the State for that matter; nor was any other evidence offered by complainant showing what the value of such property in Richmond County or any of the other one hundred and sixty Counties of the State was, whereby any comparison might have been made by the Court as to what percentage, the values as shown by said reports, bore to the fair market value of property throughout the State. (Assignments of error page 48 Supra).

(j) Likewise was the report of H. J. Fulbright, (P. 212 and 265) State Tax Commissioner for the year 1920.

See the case of *First National Bank of Wellington vs. Chapman*, 173*U. S.*, 205, 43 *L. E.*, 669.

In the foregoing case it was contended that certain reports of the Auditor of the State for a certain year should be looked to, to determine what amount of credits was owned in a State during

a certain year, but which report the court held it did not take judicial notice of, but had this to say with reference thereto:

> "However, if we were to look at this report we should then see that the total credits do not show what portion of those credits consists of moneyed capital in the hands of individuals, which in fact enters into competition for business with nationnal banks. It is only that kind of moned capital which this court, in its decisions above cited, holds is monenyed capital within the meaning of the act of Congress.
>
> "Indeed, there is no evidence as to what the total moneyed capital in the hands of individual citizens, and included in the term 'credit' amounts to, even under the widest definition of that term."

This language it is respectfully submitted is perculiarly apposite in the present case for the reason that these reports did not tend to state as to what was the fair market value of all the property in the State on any taxable date, nor did they show that property which was returned over the State was assessed at anything less than one hundred cents on the dollar.

In other words, this court will not supply by assuption that which was not proven, as was said by it in the case of *First National Bank of Barnett vs. Ayers*, 160, *U. S.* 660, 40 *L. E.*, 573:

> "From the record in this case it is wholly impossible to determine that there is any discrimination against the holders of national bank stock. In order to come to a decision in favor of the plaintiff in error, it would be necessary for this court to take what counsel for plaintiff calls judicial notice of what is claimed to be a fact, viz., that the amount of moneyed capital in the State of Kansas from which debts may be deduced, as compared with the moneyed capital invested in shares of national banks, was so large and substantial as to amount to an illegal discrimination against national bank shareholders,—this we cannot do."

Therefore if the courts cannot supply by "judicial notice" such deficiency of evidence, clearly these reports were inadmissible.

Although the court might take "judicial notice" that property is not always assessed at its full value (which this court has held it could not do, *New York vs. Barker*, 179 *U. S.*, 279, 45 *L. E.*, 190) it could not judicially know to what extent such discrimination existed. *Louisville & Nashville R. R. Co. vs. Bosworth*, 230 *Fed.*, 222; (*Greene case*, 244 *U. S.*, 522, 61 *L. E.*, 1291).

For instance in the case of *William R. Davie vs. Briggs*, 97 *U. S.*, 628, 24 *L. E.*, 1086, it was said:

> "Where a party has been absent from his domicile seven years without having been heard of, the presumption arises that he is then dead; but there is no presumption as to the time of his death, which must be a subject of distinct proof when material."

Midland Valley R. R. Co. vs. Fulgham, 181 *Fed.* 91.

Corbin vs. U. S. 181 *Fed.* 304.

Patton vs. Tex. Pac. R. Co. 179 *U. S.*, 658, 45 L. E. 361.

If such evidence were admissible, to what taxable dates would it apply? It was wholly disconnected.

The principle ruled in the forgoing cases we respectfully submit inhibits the receiving of such testimony as referred to.

See also the case of *Geddes vs. Anaconda Copper Mining Co.*, 254*U. S.*, 590,65 *L. E.*, 425, where this court in dealing with the question of whether or not the evidence authorized a finding that a monoply existed, said:

> "There is evidence that the total production of copper in the United States and Alaska in 1899 was 581,000,000 pounds, and of the Anaconda Company 1,000,000 pounds (probably an error, 100,000,000 pounds being intended); but the total production of the world at that time is nowhere stated. The production in the United States in 1910, the year before the suit was brought, was 1,086,000,000 pounds and of this the Butte camp, in which there were several mines other than those of defendants, produced 238,000,000 pounds, or approximately 22 per cent. Here again there is no statement as to the total production of the world for that year. Whatever the fact may have been, it is obvious

> that from such evidence as this it is not possible to determine to what, if to any substantial extent, the defendants restrained or monopolized the production of copper in the United States, much less in the world."

It is submitted that this language is peculiarly applicable to this character of proof; for these reports did not even pretend to give the value of property in a single County "much less in the" entire State, on any of the taxable dates for any of the years 1911- 1917 and it is respectfully submitted the same should not have been received in evidence.

(k) The foregoing authorities apply with equal force to the affidavit of E. H. Callaway, (P 216 and 266) dated September 18, 1922, which is the subject matter of the next exception to the admissibility of evidence. This affidavit simply gave the result of a search of the records in the office of the Ordinary of Richmond County, as to certain inventories of some few estates which showed the ownership of property by the decedents at the dates of their death, but did not show the value of all such property in the County, or that any single person owned such property on any taxable date, and that the tax officials had knowledge thereof and deliberately refused to assess the same, or assessed it at any percentage of its value, and if so at what percentage. (For assignments of error see page 51 Supra).

(l) The next exception deals with the admission in evidence of the assessment made by the Board of Equalizers (P 217 and 267) on the personal property of the Estate of White for the year 1918 of some $250,000.00.

It is respectfully submitted that the action of this Board for a subsequent year should not have been received as evidence for the purpose of impeaching the official acts of Steed for previous years. For instance it has been held;

> "The omission of the proper officers of the past to assess that kind of property cannot control the performance of a duty imposed by law upon their successors."

Stillman vs. Lynch, 12 *A. L. R.,* 559.

If the omission of the predecessors of one officer is no reason why his successor should follow suit in his illegal omission, then clearly the illegal or improper act of another and entirely different Board or set of officials from that of the tax receiver should not be received in evidence to impeach his official acts.

This Court in the case of *Vickesburg, Shreveport & Pacific Railroad Company vs. Dennis*, 116 *U. S.* 670, 29 *L. E.*, 772 *said*

> "The omission of the taxing officers of the State in previous years to assess this property cannot control the duty imposed by law upon their successors, or the powers of the Legislature, or the legal construction of the Statute, under which the exemption is claimed."

Florida Central R. R. Co. vs. Reynolds, 183 *U. S.*, 471 46 *L. E.* 283.

Then certainly as stated, the act of an independent board for a subsequent year (ranging from 1 to 7 years) should not be received in evidence for such purpose.

Pittsburg C. C. & St. Louis R. Co. vs. Backus, 154 *U. S.*, 421, 38 *L. E.*, 1031.

That was a case where it appeared from the bill of exceptions that on the hearing in the lower court, "the plaintiff offered the record of the action of the State Board for the year 1890, showing an assessment, as heretofore stated, so much less than that of 1891, which record was rejected as irrelevent and immaterial," in which said ruling this court acquiesced.

Under the principle of this ruling, it is submitted that the assessment of the Board of Equalizers for the year 1918 a year not in issue and from 7 years to 1 year after the years for which the assessments were made was wholly irrelevent, and it was error in the court below to allow the same in evidence.

(m) Clearly the affidavit of J. B. Clews (P 144 and 268) dated August 5, 1919, in which he swore as to the amount of indebtedness due his firm by White was also inadmissible for the reason that in this State there is no provision of law whereby the

indebtedness of a tax payer may be deducted from the value of property owned by him in arriving at its taxable value.

Central of Georgia R. R. Company vs. Wright, 166 *Fed.,* 153.

Same vs. Same, 124 *Ga.,* 630.

Furthermore no relief was prayed upon this ground—the taxability and citus were conceded. Clearly such evidence did not elucidate any question of discrimination. (Assignments of error page 52 Supra).

(n) We next come to the extract of report of the Tax Commission (P. 268) made the Governor in the year 1919, (a year 8 years later than 1911 and 2 years later than 1917) giving a resume of the tax system of Georgia, but which gave no statistics which showed the value of the class of property which had been assessed as was owned in any single County or State, or in the State as a whole, but which in fact stated that there were no such statistics available to such commission, and which report then proceeded to give an *estimate or opinion* of this commission as to what amount of such property had been *returned* for taxation, and by inference what amount had escaped taxation. This report it is submitted is clearly without probative value and should have been rejected when offered.

(o) The same is true with reference to the report of John C. Hart, State Tax Commissioner (P 217 and 269) for the year 1914, the next assignment of error on the admissibility of evidence set out in the record; as was likewise the address of Henry J. Fulbright (P 217 and 269) State Tax Commissioner for the year 1919. (Assignments of error page 56 supra).

It will be noted that the report of the State Tax Commissioner was for a year subsequent to any of the years (ranging from 1 to 8) for which the assessments were made in the instant case. None of these reports contained any data which even tended to show discrimination, but the most that could be said of them was that there had been some folks in Georgia who had escaped

the payment of their just share of taxes, if indeed, they tended to show even this.

(p) The next assignment of error was upon the admissibility of abstracts of the inventories (218-25) of said several estates, and the tax returns (P 218) of said several parties; none of these show that any of this property was owned by any of the decedents on any of the taxable dates for any of the years in questions, and that this was known to the tax official and that with this knowledge the tax officials of Richmond County deliberately refused to assess this property or assessed the same at any percentage of its value, or at what percentage. (Errors page 56 Supra).

(q) The affidavit of James P. Verdery (272) and also the affidavit of H. K. Lowery set out as the next exception to the admissibility of evidence, stated no facts which tended to show discrimination against the Estate of White by Steed when making the assessments in question. In the first place as stated above, the assessments referred to therein was for an entirely separate and subsequent year from any of the years covered by the assessments sought to be enjoined; and in the second place, it showed that Callaway, Executor of White, was before this Board when the assessment at $250,000.00 for the year 1918 was made, contending with said Board that the property was not taxable at all, by reason of the fact that White was an alien and not subject to be taxed in Georgia. (He started out in his bill in this case to make such contention but the record discloses that such was not insisted upon and if it had been it would have been utterly untenable). Who can say that such a contention before that lay board was not the impelling reason which caused it to assess this property at the sum of $250,000.00? Doubtless they thought it would be better to get a small amount of taxes, rather than run the risk of getting none at all, etc.

This to say the least, would be the most charitable view to take of its action. But even though this Board might have violated its oath in making the assessment it did, certainly their illegal act

was not proper evidence to impeach the act of the receiver in making the assessments he did for the years 1911 to 1917, both inclusive, *on the undisputed facts he had before him when such assessments were made. The significant fact about this evidence is that is does not state there was any systematic rule which had been established whereby property was assessed at any percentage valuation, nor what such percentage rule was. In face of complainant's allegations, if such rule had existed surely these affiants would not have hesitated to have said so; and the fact that they did not, shows it did not exist.*

(r) The next assignment of error deals with the receipt in evidence of the affidavit of one H. R. DeJarnette, (P 222 and 273) a member of the Tax Commission above referred to, in which he stated that he had been appointed on said Commission by the Governor under an Act of 1918 and served as such until the Commission made its report on June 1, 1919, *a year running from one to eight years later than the years for which the assessments were made*, and that in his opinion the reports of the Comptroller-General did show as having been returned for taxation more than 10 per cent. of that class of property was owned throughout the State, etc.

Clearly this affidavit was wholly without probative value and should not have been received in evidence for the purpose of attempting to show the illegal, unconstitutional discrimination contended for by Callaway, Executor of said White (Assignment errors page 61 supra).

(s) The next assignments of error have reference to affidavit of one G. W. Graham of Burke County, Georgia; three affidavits from citizens of Wilkes County; 3 from citizens of Floyd County; 3 from citizens of Habersham County; 3 from citizens of Coweta County; 3 from citizens of Chatham County; 3 from citizens of Bibb County; 3 from citizens of McDuffie County; 3 from citizens of Putnan County; 3 from citizens of Troupe County; 3 from citizens of Columbia County; 3 from citizens of Burke County, and 1 from Richmond County (P. 223 etc.) all of which

are practically af the same import. In these several affidavits, practically all of the affiants quoted certain figures taken from the reports of the Comptroller-General of the State of Georgia, and stated that *in their opinion* figuring from these reports the same did not show a rate of more than 20 per cent. of the value of the land in said Counties, 10 per cent. of the amount of money, notes and accounts, and 5 per cent. of stocks and bonds which were owned by the various residents of said several Counties. All these affidavits gave one opinion. *None of them gave the name of a single owner of a single dollar's worth of said property on any taxable date for any of the years in question, nor did they give the value of all property owned by all the citizens of said several Counties and the amount for which the same had been returned for taxation, whereby any comparison could be made as to what percentage of value property in the various Counties was assessed at, and under the authorities hereinbefore cited, it is respectfully submitted that none of them were properly admissible in evidence, and therefore that the court erred in allowing them to be introduced.*

See the case of Walker vs. McLoud, 204 U. S., 302 (2) where this Court held that "a statement that the principal chief of the Choctaw Nation ratified an illegal sheriff's sale, giving no facts upon which the alleged ratification was based, is a conclusion of law, and as such is inadmissible in evidence."

This language is perculiarly applicable to all the evidence offered by Complainant.

(t) After the introduction of all the evidence hereinbefore set out in brief, appellants moved to exclude the same because it did not show any systematic, intentional, illegal, unconstitutional discrimination against plaintiff as inhibited by the Fourteenth Amendment to the Federal Constitution which motion was overruled and such ruling is assigned as error herein. (P. 280).

While it is submitted that none of the foregoing evidence was admissible in the first instance, still if by being coupled up with other evidence it might have been, this was not done. In other

words if complainant had introduced abstracts of the sales prices of real estate of all property in Richmond County and throughout the State, and then the amount at which all property had been returned for taxation, whereby a comparison could have been made and thus in a degree figure at what *percentage value property generally* was assessed at, it might be different. But the foregoing evidence alone could not stand and should have been rejected. This burden was upon Complainant. Certainly no such burden was upon the State. The presumption was in its favor that all property was properly assessed as the law demanded. *Sunday Lake Iron Co. vs. Wakefield* 247, *U. S.* 350, 62 *L. E.* 1154.

See Louisville & Nashville R. R. Co. vs. Bosworth, 230 Fed., pages 222-3.

As the discussion in detail above and that which will follow, and the authorities cited, and the authorities hereafter to be cited, will necessarily envelope this assignment, we shall not deal further with it here.

See however, *Union Tanning Co. vs. Commonwealth,* 96 *S. E., (Va.)* 780. This case discusses the *Green* cases reported in 244*U. S.*, 499, 61 *L. E.*, 1261, etc.

Magnolia Bank vs. Board Supervisors Pike County, 3 *A. L. R.*, 1365.

Appeal dismissed by United States Supreme Court, 248 *U. S.*, 548, 63 L. E., 414.

Corbin vs. U. S. 181 *Fed.* 296.

Albany Steel Co. vs. Lundberg 121 *U. S.*, 451, 30 *L. E.* 982.

GENERAL ASSIGNMENTS OF ERROR

III.

3. IF THE COURT WAS CORRECT IN OVERRULING RESPONDENTS MOTION TO DISMISS, AND IN OVERRULING THE OBJECTIONS TO COMPLAINANT'S EVIDENCE. DID IT NOT ERR IN ENJOINING THE EXECUTIONS UPON THE GROUND OF UNCONSTITU-

TIONAL DISCRIMINATION IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

THIS QUESTION PRESENTS FOR CONSIDERATION THE FOLLOWING SEVERAL LEGAL PROPOSITIONS:

(a) *Burden of Proof was upon Complainant to Prove his Allegations of Discrimination with Certainty.*

The first general assignment of error in the record is as follows:

> "1. Because the burden of proof was upon complainant to prove his allegations of discrimination to all intents and purposes by evidence so strong that the court would not be left doubtful in the premises, or to conjecture as to what amount of taxes was due, or as to what extent complainant had been discriminated against as was done in the instant case, as witness, the following language quoted from the Court's decision;
>
> > 'Had the Estate of White already paid such an amount that the enforcement of any additional amount would be a discrimination? This cannot be answered with confidence. There is not sufficient evidence to justify a positive and exact conclusion.'
>
> And it was error in the court below, on failure of such proof, to then turn to the finding of the Board of Arbitration, which the court had held could not be legally held after the Act of 1918, and be guided thereby as such award amounted to no more than the opinion of the three men who composed the same, neither of whom were before the court testifying to any fact under oath, and especially was this true when the record discloses that the same evidence which had been submitted to said Board of Arbitration, was re-introduced on the present hearing in addition to the other evidence offered by complainant, and with all such evidencce before the Court the record discloses, as evidenced by the Courts language quoted, that it was not at all satisfied with the character of proof submitted, and under such circumstances, it was error to grant the injunction restraining the executions in question." (P. 280).

In the case of *Sunday Lake Iron Company vs. Wakefield* 247 *U. S.*, 350,62 *L. E.*, 1154, Mr. Justice McReynolds said:

> "The good faith of such officers (having reference to tax officers) and the validity of their actions are presumed; when assailed, the burden of proof is upon the complaining party."

Mr. Justice Day, then Circuit Judge, in the case *of Louisville Trust Company vs. Stone*, 107 *Fed.*, 305, laid down the rule, thus:

> "Every presumption being in favor of the propriety of the action of assessment officers, and errors of judgment on their part not being a subject for injunction, proof that systematic discrimination is being made against a complainant corporation must be clear and convincing, and *conclusively preponderate* over *opposing* evidence before a federal court will interfere by injunction in its behalf."

The record discloses, in the language of Barrett, Judge, that complainant did not carry such burden.

We submit that a Federal Court of Equity is never justified in enjoining State taxes upon unjust and invidious discrimination except when the evidence is *"clear, unequivocal,* and *convincing,* and that it *cannot* be done upon a *bare preponderance* of evidence which leaves the issue in doubt." *United States vs. Budd*, 144 *U. S.*, 154, 36., *L. E.*, 384.

Confessedly the evidence in the case sub judice was not "clear, unequivocal and convincing (the court itself said so) and did leave "the issue in doubt." This being true the lower court erred in enjoining the tax executions as it did.

Midland Valley R. R. Co. vs. Fulgham 181 *Fed.* 91.

Patton vs. Texas Pac. R. Co. 179 *U. S.* 658, 45 *L. E.* 361.

United States vs. Ross, 92 *U. S.* 281, 23 *L. E.* 707.

Manning vs. Mutual Life Ins. Co. 100 *U. S.* 693, 25 *L. E.* 761.

(b) *Rule of Evidence as Laid Down by this Court to Prove Discrimination was not met.*

This general assignment of error as appears in the record is as follows:

> "2. Because the evidence submitted was wholly insufficient under the rules as laid down by this Court as to when a Federal Court of Equity will enjoin a State from collecting its revenues, such rule being, that before such injunction can be obtained, the complainant must show a uniform, systematic practice existing among the taxing officials, whereby other property in the State is assessed at a lower rate than that of the complaining taxpayer, and plaintiff having failed to produce such proof, it was error to grant the relief sought." (P. 280).

The rule is that, *"unless it is shown that the undervaluation was intentional and systematic, unequal assessment will not be held to violate the equality clause," of the Federal Constitution. Southern Railway Co. vs. Watts,* 260 *U. S.,* 519,67., *L. E.,* 375.

Mr. Justice Brandeis in the foregoing case cited a great number of authorities in substantiation of the rule stated, which we shall not here repeat.

It is respectfully submitted that the evidence of complainant did not come up to the requirements as laid down by this Court.

Further, this court in speaking of what character of testimony would authorize a court of equity to set aside a written instrument upon the ground of fraud or mistake, in the case of *United States vs. Budd,* 144 *U. S.,* 154, 36 *L. E.,* 384 said:

> "We take the general doctrine to be, that when in a court of equity it is proposed to set aside, to annul or to correct a written instrument, for fraud or mistake in the execution of the instrument itself, the *testimony on which this is done must be clear unequivocal,* and *convincing,* and *that it cannot* be *done upon a bare preponderance* of *evidence which leaves the issue in doubt.* If the proposition, as thus laid down in the cases cited, is sound in regard to the ordinary contracts of private individuals, how much more should it be observed where the attempt is to annul",

the acts of sworn officers of a State in an effort to show that such officers had violated their duty and administered the law "with

an evil eye and an unequal hand." *United States vs. Land Grant Co.* 121 U. S. 325 (5) 30 L. E., 949. *Campbell vs. Northwestern Eckington Imp. Co. 229 U. S.* 561 *at* 573. *U. S. vs. American Bell Tel. Co.* 167 *U. S.* 224, 42 *L. E.* 144.

Indeed, this Court, as, has the Supreme Court of the State of Georgia, has held that "no *latitude* of *intention should be indulged in a case like this. There should be certainty to every intent..... and no fact should be omitted to make it out completely, when the power of a Federal Court is invoked to interfere with the Course of a State" in the collection of its taxes. Ah Sinn vs. Wittman,* 198 *U. S.*, 500, 49 *L. E.*, 1142, quoted in the *Georgia R. R. vs. Wright*, 125 *Ga.*, 605.

> "The *proof must be clear and convincing* that a systematic discrimination is being made against complainant before a federal court will interfere by injunction with the assessment of taxes and the collection of revenues of the State."

Louisville Trust Company vs. Stone, 107 *Fed.*, 305, (a decision by the late Mr. Justice Day, then Circuit Judge, of the Sixth Circuit).

See the case of *Tulsidus vs. Insular Collector* of Customs 262 U. S., 258, 67 L. E., 969, where this court in passing upon the character of proof necessary to be produced by an alien who had been ordered deported, said on page 266 U. S., and 974 L. E., that, "petitioner should have produced something more than their own statements of their status as merchants. It was for them to establish *their exemption from the prohibition of the law.* for them to satisfy the insular officials charged with the administration of the law. If they left their *exemption* in *doubt* and *dispute, they cannot complain* of a *decision against it.*"

If such be true in a deportation case, how much more should it be true in a case like the one subjudice; a case wherein one is asking a Federal Court to enjoin state taxes. That the "Exemption" from taxation sought in this case was left in doubt is evidenced by the lower court's own statement. This being true it is submitted that it was error in the lower court to grant com-

plainant the "exemption" from taxation it did,—for such was the effect of the decree. See Philadelphia & Reading Ry. Co. vs. Polk 256 U. S. 332, 65 L. E. 958.

The merest cursory examination of the record in this case will disclose that the proof submitted in no wise measured up to any such requirements. The court itself said that the issue of discrimination was left in doubt; "Had the Estate of White already paid such an amount that the enforcement of any additionl amount would be a discrimination. This cannot be answered with confidence. There it is not sufficience evidence to justify a positive and exact conclusion" (Print P. 198).

In the cases relied upon by appellee, the proof was either uncontradicted, or so overwhelming as to remove every doubt as to the discrimination claimed. (Indeed in no case has this Court ever sustained an injunction against the enforcement of State taxes upon evidence as weak as that in this case so far as we have been able to discover, and we have studied every decision that has been handed down by it that we have been able to find, which delt with such questions).

For instance, in the case of *Taylor vs. Louisville & N. R. Co.* 88*Fed.*, 350, decided by Judge Taft, the evidence was uncontradicted; as witness the following language quoted from page 362 thereof:

> "We find from the evidence, which is uncontradicted, that generally in the State of Tennessee, for a number of years, the assessors and the Board of Equalization of each County have intended to assess and have assessed, real and personal property at a uniform percentage *less* than its real value."

And in the case of *Green vs. Louisville & N. R. Co.*, 244 *U. S.*, 499, 61 *L. E.*, 1280, it was said:

> "The allegations of the bills, not being denied, were taken as true, and final decrees were made granting relief against the enforcement of the disputed assessment, and restraining the imposition of franchise taxes upon plaintiffs for the year 1915, based on assessments to their fran-

> chise at greater values than those conceded in the respective bills of complaint, which were 60 per cent. of actual values."

In the second case reported in 244 *U. S.*, 522, 61 *L. E.*, 1291, the court said:

> "It is contended by defendants that the evidence was insufficient to warrant the conclusion of the learned District Judge that in fact property in general in the State of Kentucky was systematically undervalued. A similar question of fact was involved in Coulter vs. Louisville & N. R. Co. and this court held the evidence to be insufficient. In the present case besides much to the same effect as that presented in the Coulter case, a mass of additional evidence was introduced, including extracts from the United States census reports for the year 1910, reports of the State Board of Equalization for the years 1910, 1911, 1912 and 1913, reports of the State Tax Commission of 1913; testimony of a member of the Board of Equalization who served in the year 1908 to 1911, inclusive; affidavits of nearly two hundred individuals from forty-seven counties in different parts of the State; and much besides."

It will be noted the lower court in that case found as a fact the question of discrimination. There was no supplying of proof by any judicial notice. See same case, 230 Fed., at page 222.

We would also call the court's attention to the fact that none of the *evidence submitted in these cases was objected to on the trial in the lower courts.*

None of the evidence of plaintiff showed what was the total value of all the property in a single County, much less than what was the value in all the Counties of the State.

Geddes vs. Anoconda Copper Mining Co., 254 *U. S.* 590, 65 L. E. 425.

See also *Union Tanning Co. vs. Commonwealth*, 96 *S. E.*, (*Va.*) 780.

German National Bank vs. Kimball, 103 *U. S.*, 732, 26 *L. E.*, 469.

Florida Central R. R. Co. vs. Reynolds, 183 *U. S.*, 471, 46 *L. E.*, 283.

Winona vs. Minnesota, 159 *U. S.*, 526, 40 *L. E.*, 247.

Wyerhauser vs. Minnesota, 176 *U. S.*, 550, 44 *L. E.*, 586.

(c) *White was a Willful Tax Defaulter and if Any Discrimination was Shown, He Brought it About, and His Executor Has No Cause To Complain.*

This assignment of error is in the following language:

> "3. Because the record disclosed that White was a willful tax defaulter, and if any discrimination was shown by the evidence of Complainant the same was brought about by the said J. B. White himself, by reason of his failure to make a proper return of his property for taxation during his lifetime, and therefore his Executor could not claim relief against the same by injunction, as was done in the instant case, and to grant such relief when such fact appeared, appellants say was error." (281).

It is respectfully submitted that one cannot place himself in the position as White did. *Force the tax officers of the State upon their own resources to assess property which the tax payer should have returned but failed to do, and when, after death, his executor is called upon to make a return and place a valuation thereon, he in turn persists in a refusal to do so and thus force the tax officers to resort "to the best information" they can obtain in making assessments, and then raise the issue of illegal, unconstitutional discrimination, when the assessments as made are admitted not to exceed the valuation required by the Constitution and laws of a State. This is the position in which appellee stands before this court.*

In the case of *Bankers Trust Co. vs. Blodgett*, 260, *U. S.*, 647 67, L. E. 439, it was held that:

> Executors and administrators do not own the property committed to them for administration, but hold it subject to the liabilities and burdens on it, including the liability for a tax imposed by the State and the penalties for nonpayment of the tax and whatever interest distributees or creditors may have therein, is subject to the same liabilities and burdens.

It is therefore submitted that the "burden" was upon White and White's executor to make a fair disclosure of this property and return the same at its fair market value for taxation. Had this been done, this litigation would never have arisen.

Section 1099 of the Code of Georgia, is as follows:

> "It is the privilege of any tax payer of the County where a return is made to complain to the receiver at any time before his digest is completed that any return is below the true value of the property, in which case he shall notify the person who made the return complained of, if practicable, verbally or by writing giving him the name of complainant and the ground of complaint, and shall proceed to have a new assessment in the terms of the preceding section."

This section of the Code was in force during Mr. White's life time and if he had any complaint to make of the returns or non-returns of other tax payers during those years, this section gave him the opportunity to do so. Not only did he not do this, but he absolutely refused to make any return of this property at all.

The undisputed facts in the record show that his personal property tax returns for the several years in question was for only $300.00 *of household and kitchen furniture, although he owned this property worth some* $1,500,000 *and deliberately refused to return the same, as likewise did his executor.* (See Print P. 4 Par. 13), Such return as Callaway did make was *in truth no return*.....White was the original defaulter and Callaway, Executor persisted therein.

In other words, as was said in the case of *Canadian Railroad Co. vs. Eggen, 252 U. S., at* 561, 64 *L. E.,* 716:

"The discrimination of which he complains could arise only from his own neglect."

In the case of *First Nat. Bank vs. Weld Co. Adv. Sheets, U. S. Court* 68 *L. E.* 406 this court said:

> "Plaintiff made and delivered to the county assessor of Weld County the statement required by law. The assessor

thereupon fixed the value of its shares, as well as that of the shares of other banks within the county, at their full cash and market value; but fixed the assessed value of the property of the remaining tax payers in the county at 61 per cent. for 1913, and 80 per cent. for 1914, of such cash and market value. The county board of equalization accepted this assessment without change. The assessor thereupon transmitted to the tax commission the abstracts required by law. The tax commission determined that the property of the county as a whole had been under-assessed, and recommended a horizontal increase of 63 per cent. in 1913, and 25 per cent. in 1914, as necessary to bring it to the full cash value. This determination was approved by the State board of equalization, and the county assessor was directed to make the increase, *with the result, as alleged, that plaintiff's assets, and those of all other banks in the county, were in fact assessed at an amount 63 per cent. in excess of their value for the year* 1913, *and 25 per cent. in excess thereof for the year* 1914. *In other counties of the State, either no increase of valuation was made, or the increase was comparatively small. The result was that the banks of Weld County were assessed and compelled to pay upon a valuation grossly in excess of that put upon other property in the same county, and likewise in excess of that put upon other banks in other counties of the state. It does not appear from the complaint that plaintiff applied to any of the taxing authorities to reduce the assessment of its property or correct the alleged inequalities, prior to the final levy of the tax; but, some time after such levy had been completed, made application for abatement and rebate, which application was approved by the county board, but disallowed by the state tax commission.*

We are met at the threshold of our consideration of the case with the contention that the plaintiff did not exhaust its remedies before the administrative boards, and consequently cannot be heard by a judicial tribunal to assert the invalidity of the tax. We are of opinion that this contention mush be upheld."

See also *Pone Mob Mills vs. Town of Libson,* 94 *Atl.,* 919.

People vs. Hibernian Banking Association, 92 *N. E.,* 305.

Glidden vs. Harrington, 189 *U. S.,* 255, 47 *L. E.,* 798.

In the case last cited, this court said:

> "Defendant did not choose to comply with that notice by submitting a list of the property held by him in trust, although he subsequently made application for abatement, upon which application a number of hearings were had. Upon his failure to make his return, these assessors did the only thing they could do—Ascertain as nearly as possible the particulars of the personal estate and estimate it at what they believed its just value. If defendant held personal property as trustee it was as much his duty to disclose it as if it had been individual property."

and thereupon held that there had been no violation of the Fourteenth Amendment of the Constitution of the United States. So we say with reference to the case sub judice.

There is no attack made upon the laws of Georgia for lack of notice, as was made upon the laws of Georgia in the case of *Central of Georgia Railway Co. vs. Wright*, 207 *U. S.*, 127,52 *L. E.*, 134. It is submitted that if the complaint there had been solely a question of a deliberate default that decision would doubtless have been different, for the courrt in rendering its decision therein used this language:

> "We must decide the case in view of its relations to a tax payer not fraudulently concealing his property, and honestly contending, with reasonable grounds for the contention, that it is not taxable under the laws of the State."

Here there was no contention that the property was not subject to taxation, but the contention was that White had been discriminated against. Had he not "concealed his property" and forced the Tax Receiver to act, he would never have had any ground to raise any such complaint.

The most casual glance at the record in this case touching the conduct of the tax receiver during the long period in which a return of this property was being insisted upon, shows that he acted with the utmost solicitation for complainant and finally entered his assessment only after a refusal of the tax payer to disclose the property or give the value thereof, and then acted only upon un-

disputed sworn evidence of the ownership and value and after mandamus had been instituted to compell him to do his duty on the several taxable dates for the years in question.

In the case of *O'Neal vs. Virginia etc. Bridge Co.*, 18 *Md.*, 1, 79 *Am. Dec.* 669, the court said:

> "Where provision is made for the relief of property owners against the improper exercise af the taxing power the law expects those concerned to be diligent in protecting their interests and if they omit the opportunity, they cannot be relieved in equity, if at all, unless a strong case is presented, showing, among other things that they have not been altogether in default in availing of the means provided by the tax law. And there must be something more than legal error assigned; it must present facts appealing to the conscience of the court, to prevent wrong and injustice."

It is respectfully submitted that no such case is made by the record in this case.

IV.

(d) *Evidence of Respondents, Appellees, Wholly Refuted Any Claim of Discrimination.*

This assignment of error (Print page 281) we shall discuss after discussing 5 and 6.

This brings us to the fifth general assignment of error.

V.

(e) *Complainant's Evidence, Given its Fullest Weight, Merely Tended to Show That Possibly Some Tax Payers Had Been Successful In Dodging Their Just Share of the Burden of Taxation; But It Did Not Prove That the Tax Officials Were Responsible Therefor, and Even Though Some May have Escaped, This Would Not Afford Complainant Any Protection When Called Upon To Pay His Just Taxes; Yet This Is In Effect His Contention.*

This assignment of error is set out in the record (P. 282) in the following language:

"5. Because it was encumbent upon complainant in the court below, appellee herein, to allege with certainty, and prove by reasonable positive credible evidence an intentional, arbitrary, uniform, systematic, unlawful discrimination against him by the taxing authorities, and to what extent he was, by them, discriminated against. Appellants say that this he wholly failed to do, and that his allegations of discrimination are vague and indefinite, and his proof equally so. There was no proof of any facts which showed any unconstitutional discrimination. No evidence was introduced by him showing any uniform, systematic, arbitrary rule existing between the taxing officials of the State, whereby other property of likekind, as complainant's (such as had been assessed in this instance), had been assessed at any less percentage than its market value; nor was there any legal proof that the Tax Receiver of Richmond County had uniformly and systematically assessed other property of like kind in said County, at anything less than its market value. The market value of the property in question, which had been assessed, was not disputed, and there was no proof of the ownership of other property of like kind owned by any other tax payers, or its market value, on any of the taxable dates for either of the years in question, and which, was known to the tax officials of the State, or Richmond County, and that had not been assessed at all by them, or had been assessed at any percentage of true market value. Giving complainant's evidence its fullest force, it merely tended to establish that there were tax defaulters in the State; and that some, when returning their property for taxation, made false returns of its value; it merely tended to show that some tax payers thus may have escaped their just share of the burdens of Government, but such proof, when there was no attack on their tax returns, could not show unconstitutional discrimination against complainant, and is no defense to complainant when called upon to bear his just and legal taxes. And furthermore, appellants submit that if complainant's evidence established the existence of any rule existing between the tax payers of the State, whereby they would not return their property at all, or where returning the same, would return it at less than its fair market value; there was no evidence whatever that such custom or such rule was the result of any agreement between the tax officials of the State, or instituted by them,

and appellants say it was error in the lower court to grant any injunction against the State's revenue in this instance."

The truth of the matter is, that boiled down to its last analysis, complainant's whole case was launched upon the proposition that because *others may have escaped their just share* of the burden of Government, that he should be allowed to escape also.

Indeed, the court itself unwittingly fell into such error as will be seen by the following quotation from its opinion appearing on page 198 of print. Speaking of other estates which had not been assessed it said:

> "that easy opportunity was afforded the taxing authorities of Richmond County to learn of other estates which were as liable, though in smaller amounts, as the White Estate; that no proceedings were had against but one of them, and that was *settled* for 30 or 33 cents on the dollar; and that these facts were known to the tax receiver of Richmond County when the assessments against the White estate were made. With this knowledge the assessment against the White estate at the true market value was knowingly, willfully and intentionally "administering" the law so as to place upon one person.....a burden from which another person.....similarly situated is relieved."

(We call the Court's attention to the fact that a settlement was made in the case referred to and so far as this record shows, there was a compliance with the law, there was no question of discrimination involved).

It is submitted that because others may have escaped, this could be no defence to complainant.

In the case of *Florida Central R. R. Co. vs. Reynolds*, 183 *U. S.*, 746, 26 *L. E.*, 469, this court said:

> "If taxes are to be regarded as mere debts then the effort of the State to collect from one debtor is not prejudiced by its failure to make like effort to collect from another. And if regarded in the truer light as a contribution to the support of government, then it does not *lie in the mouth of one called upon to make his contribution to complain* that *some other person has not been coerced into a like contribution.*"

> "A tax payer cannot protect himself against a legal and proper demand for his own taxes, by alleging that another tax payer has been assessed for taxation in a way to render his taxes less than they ought to be under a proper administration of the law." *Georgia Midland R. Co. vs. State*, 89 *Ga.*, 597.

To the same effect is the case of *Burkhart vs. Fitzgerald*, 137 *Ga.*, 366, where the Georgia Court said:

> "The mere fact that certain land within the City limits of Fitzgerald, owned by certain other persons, had been taxed, not ad valorem, but upon a valuation which was the difference between their value for agricultural purposes and as town lots, furnished no reason why the plaintiffs should not pay a tax on their property greater than the percentage of the values placed upon such agricultural lands for taxation."

We quote from the case of *Georgia R. R. vs. Wright*, 125 *Ga.*, 605, the following:

> "It was contended that there is a uniform custom prevailing in this State for tax payers to return their property at less than its value. If there is such a custom, it did not have its origin with the tax officers of this State; and there was evidence from which the judge could find, even if it did not constrain him to find, that tax payers conforming to such a custom did so without the consent or authority, and over the protest of the tax officers of the State. The law of this State requires that each tax payer shall return his property for taxation at its true market value. The record discloses that the attorney General of the State has so advised the comptroller general, and that the comptroller general has so instructed the surbordinate tax officers of the State. It certainly cannot be held that a denial of the equal protection of the laws results to this plaintiff from a custom of tax payers in contravention of law, which has arisen over the protest and against the instruction of the tax officers of the State. It would be a startling proposition to say that no person should be required to pay his taxes, because some citizens are shrewd enough or unscrupulous enough to succeed in having their returns received by the tax officer when the valuations are lower than the law requires, and lower than the oath which each tax payer

makes to his return requires. There may be persons within the limits of the State, probably many, who have avoided the burden of taxation, either by not returning their property for taxes or by returning it at a value lower than its true market value. But the evidence in this case authorizes, if it does not require, a finding that the tax officers of this State were not parties to such a practice. The administration of the tax laws of a State will not be declared to be in violation of the fourteenth amendment to the constitution of the United States, unless it appears that the officers charged by the law of the State with the collection of taxes knowingly, wilfully and intentionally administer the law so as to place upon one person or class a burden from which another person or class similarly situated is relieved. The record does not disclose that such has been made out against the tax officers of the State of Georgia. Mistakes may have been made in the reception of the returns of some tax payers. Mistakes may have been made in the assessment of property in given instances. But there is nothing in the record to authorize the conclusion that the comptroller general or the subordinate tax officers have in any instance wilfully, knowingly, or intentionally administered the law so that it would be harsh, burdensome, or oppressive as to one, and releive another similarly situated from like burdens. As said by the Supreme Court of the United States, this is a matter of proof. 'No latitude of intention should be indulged in a case like this. There should be certainty to every intent.' Even if the proof does not show a perfect and exact administration of the law, it fails to show such an administration as would bring down upon the heads of the officers the condemnation of the Supreme law of the land, which denounces an administration 'with an evil eye and an unequal hand'."

The Supreme Court of Georgia on October 10, 1923, in the case of *Harber vs. Welchell, Ordinary, Reported in* 156 *Ga.*, 601 had this to say where property had escaped inheritance tax:

> "The inheritance tax law contemplates the assessment of all property of the decedant subject to that tax. The *omission to assess these lands* and to *collect the inheritance tax on their assessed value by the proper officers of the County does not relieve the tax payer from such tax. No such easy method of paying taxes has yet been promulgated by law.*"

The evidence of respondents conclusively showed, it is submitted that it was not the fault of the tax laws, or of the tax officers of the State which brought about any rule whereby intangible property was not returned, or where returned that is should be at only a nominal value, nor that the same was assessed at anything less than its fair market value, where known.

The Comptroller General of the State swore that such was not the fault of his office, that he fully instructed Tax Receivers over the State as to what the law was and that it was their duty to assess all property at fair market value, which fact was borne out by his book of instructions issued each year which are in evidence; likewise the evidence of Fulbright, Tax Commissioner; Steed, Tax Receiver of Richmond County, and some 85 or more other Tax Receivers from as many separate counties thereof.

Certainly complainant did not prove his charge of discrimination as demanded under the above ruling.

Indeed, in the instant case, the lower court exhonorated the Georgia law from any unconstitutional infirmity, and also the tax officials of Georgia from having instigated any rule whereby taxpayers of the State should not return their intangible property for valuation, or when returning it, should return the same at any percentage of its value, as witness, the following language:

> "I have not overlooked the requirements of the statutes that property must be returned or assessed at its true market value; that taxing officers claim not to be responsible for false returns; that the Comptroller General urges that the law be complied with, and that the Tax Receiver of Richmond County and Tax Receivers elsewhere state that there is no systematic, uniform system of taxing any kind of property at less than its true market value." (Print page 198).

If the *evil complained of was not caused by the law, or the tax officials*, then we are at a loss to see wherein it could be held that complainant had been denied by them any rights guaranteed to him under the Constitution of the United States. Indeed, it is only the evil done by one of these that the Federal Constitution

will relieve against; and in order to show illegal, unconstitutional discrimination, it must be shown by "clear unequivocal and convincing" evidence that "the officers who are appointed to make assessments combine together and establish a rule or principal of valuation, the necessary result of which it to tax one species of property higher than others."

German National Bank vs. Kimball, 103 *U. S.,* 732, 26 *L. E.* 469.

Sunday Lake Iron Co. vs. Wakefield, 247 *U. S.,* 350, 62 *L. E.,* 1154.

United States vs. Budd, 144 *U. S.,* 154, 36 *L. E.,* 384.

Florida Central R. R. Co. vs. Reynolds, 183 *U. S.,* 746,46 *L. E.,* 283.

Winona vs. Minnesota, 159 *U. S.,* 526, 40 *L. E.,* 247.

Wyerhauser vs. Minnesota, 176 *U. S.,* 550, 44 *L. E.,* 586.

We shall attempt to demonstrate from the record that under no view of the same can the decision of the lower court be sustained.

Let's for a moment look at the allegations of the complainant. It does not even state with any degree of certainty to what extent complainant claimed he had been discriminated against. In paragraph 55 of complaint (Print page 18) it is alleged as follows:

> "55. Your Orator charges, upon information and belief that in said County of Richmond, during all of said years from 1911 to 1917, inclusive, bonds of local corporations owned by residents of said County, were not returned or assessed, for taxation. That during said years the inventories of estates of a large number of deceased residents of said County appear upon the records of the Court of Ordinary of said County, the same source from which the Tax Receiver obtained the list of securities belonging to the estate of said J. B. White as the basis of this proceeding, showing taxable securities, money and notes owned by said deceased tax payers amounting to over a million and a half dollars which had not been returned for taxation nor assessed, and yet notwithstanding said facts neither said

> Tax Receiver nor any other agent representative of said State or County, have made any effort to have said securities, money or notes returned, assessed or taxed for either of said years or for any preceding year except in the case of one small estate, where the heirs were all non-residents, and the settlement made in that case was at a nominal percentage of the full value. That the Tax Receiver of said County claims that neither he, as Tax Receiver nor the County Board of Tax Assessors, ever assess any property at its full value, but try to assess real estate at 66 2-3 per cent. of its value. That even such assessments are subject to the uniform right of the owner to arbitration, which almost uniformly further reduces the assessment."

The fourth prayer of the original complaint was as follows (Print page 21):

> "4. That the assessment of taxes against the estate of said J. B. White on said unreturned property for the years 1911 to 1917, inclusive, be, by decree of this Honorable Court, fixed finally and conclusively at the amounts respectively ascertained, named and determined in the award of said Board of Arbitrators, on September 2nd, 1919, and that the payment by your Orator of the full amount of all taxes due on said assessments, including principal and interest, as calculated by said Tax Collector, to September 5th, 1919, namely: the sum of $27,980.88, which said sum was tendered by your Orator to said Tax Collector on said date, shall be in full settlement and satisfaction of all State, County and School taxes due by the Estate of said J. B. White for said years."

Nowhere in his complaint did he allege any specific percentage of valuation at which said property *should have been assessed* for taxation, but *the whole burden of his complaint was to procure an adjudication of the validity of the award plead as res adjudicata; and upon payment thereof, that he be given a receipt in full. This a Federal Court could not do. Coulter vs. L. & N. R. R. Co.*, 196 *U. S.*, 599,49 *L. E.*, 615.

He gave the courrt no rule to gage the amount of tax he should pay, but insisted that the amount of tax should be fixed finally and conclusively at the amount arrived at by the Board of Arbi-

tration, which Board both the lower court and the State Courts held was void.

Paragraph of Decree Which Dealt with Question of Discrimination.

That portion of the Decree of the lower court dealing with the question of discrimination, will be found on page 198 of the Print, and reads as follows:

> "The evidence is voluminous, and in some material matters contradictory. A discussion of it in detail would probably prove of but little value. I entertain no doubt from the evidence that the fixed principles controlling the officers in Richmond County who assess for tax purposes are that no properrty is assessed for tax purposes at its true market value, and that bonds and stocks are never assessed at above 50 per cent.. of their value; that it is common practice throughout the State and acquiesced in by the taxing authorities, for bonds, and stocks of non resident corporations to be not returned at all or at a very small percentage of their market value; that easy opportunity was afforded the taxing authorities of Richmond County to learn of other estates which were as liable, though in smaller amounts, as the White estate; that no proceedings were had against but one of them, and that was settled for 30 or 33 cents on the dollar; and that these facts were known to the tax receiver of Richmond County when the assessments against the White Estate were made. With this knowledge the assessment against the White Estate at the true market value was knowingly, wilfully and intentionally" administering "the law so as to place upon one person.....a burden from which another person.....similarly situated is relieved.
>
> "I have not overlooked the requirement of the statutes that property must be returned or assessed at its true market value; that taxing officers claim not to be responsible for false returns; that the Comptroller General urges that the law be complied with; and that the tax receiver of Richmond County and the tax receivers elsewhere state that there is no systematic, uniform system of taxing any kind of property at less than its true market value. But the evidence not only warrants, but practically demands,

> the conclusion known of all men, That, if the Estate of White be required to pay taxes on bonds and stocks of non resident corporations at their true market value, this estate will be discriminated against as compared with every other citizen of this county in like situation during the years for which taxes are sought whether for current taxes or past taxes. Thus convinced, I am bounnd to grant protection against such discrimination.
>
> "Had the estate af White already paid such an amount that the enforcement of any additional amount would be a discrimination? This can not be answered with confidence. There is not sufficient evidence to justify a positive and exact conclusion. The *only tribunal that has attempted to reach such conclusion is the Board of Arbitrators, whose authority in the premises has been denied, but whose investigation and conclusion can nevertheless be properly used as an aid.* Upon the payment of the taxes *fixed by the board* I am satisfied that there will have been paid much more than the average, and probably more than any but a very few tax payers in Richmond County on that class of property. But the significant fact is that for the year 1918 the Board of Assessors of said county assessed this class of property of the White estate at about 18 per cent while the Board of Arbitrators for 1917 valued such property for taxation at about 24 per cent., and the average of percentages fixed by the Board of Arbitrators for the seven years for which taxes are sought was something over 16 per cent. reckoning on the full market value, and over 24 per cent. reckoning on White's equity. I cannot justify a conclusion that any additional taxes can be demanded without unlawful discrimination."

We shall now attempt to demonstrate that under no view of the evidence in this record can the decree of the lower court be sustained. If the testimony of Steed is to be taken most strongly in favor of complainant, (if properly admitted) clearly not more than one third of the tax executions should have been enjoined. As witness:

> "We had a rule not to assess for full market value; (what the rule was however, he did not state); In starting out where no arbitration was demanded, I would make the assessment at full market value, but whenever it got

> down to arbitration. I never made it at true market value, but would almost always take the first assessment and put it down, and if the parties forced me to an arbitration, would settle on some basis later on lower than the full market value." (Print page 202).

At what percentage he does not state, nor how often arbitration was demanded. Certainly there were instances in which no arbitration was demanded and in which his first assessments stood. How many stood, and how many demanded arbitration, is not stated, he then proceeded:

> "The Board of Assessors never go over two-thirds valuation on mortgages, stocks and bonds. I have not been doing that. That was done by the Board of Assessors..... When I make assessments it is generally in accordance with the property value. I have never undertaken to assess any property at its full market value." (Print page 203).

Now just what Steed meant, no one can tell. What he meant by "property value" is not plain. The truth is, he hardly knew where he was.—He was hemming and hawing between his duty and the clamor of a most persistent and relentless tax defaulter.—But concede that his testimony with reference to "a rule" had reference to what he said was done by the County Board of Assessors; and concede that this testimony was uncontradicted and stood out as the bald truth of the method of assessing property in Richmond County, then, certainly, giving it the utmost weight, this would not have authorized the enjoining of more than one-third of the amount of the assessments as made by Steed, whereas the decree enjoined approximately 90 per cent. On cross examination however he wholly refuted his first assertion when he stated that if a tax payer in making his returns stated that his property was worth a million dollars he would not tell such tax payer that he would assess at $200,000 but would assess the same at a million, etc. (P. 202).

Next was an affidavit of Callaway, executor, (print gaze 203). There is nothing contained therein which showed any discrimination of the slightest degree. This affidavit gave a general resume

of the steps leading up to the assessments in question but gives no facts upon which the court could determine to what extent any discrimination had been practiced against him. The truth is, it, with the several exhibits attached thereto, refuted any such claim. For instance, he attached the joint affidavit of McPherson and Dugel as to th eamount and value of the property, etc. It was this evidence of value that Steed assessed on.

Next we come to the Reports of the Comptroller General (Print page 211). These reports gave merely a total aggregate of the several kinds of property which appeared to have been returned. There are no figures given therin which would even tend to indicate how much of such property there was in the State that was not returned; nor is there anything in this report which shows the value of any property in any County that was not returned. Neither do they show that property was assessed at anything less than its fair market value, or that any was omitted. They do show however, that the Comptroller General instructed and insisted that all property should be assessed at its fair market value, as the Constitution and laws of Georgia required. (See print page 245-6). United States vs. Budd, 144 U. S. 154.

We turn now to the next evidence offered by complainant. This was the 7th Annual Report of H. J. Fulbright, (P. 212) State Tax Commissioner for the year 1920, (three years after the last year for which Steed assessed to wit, 1917; and 9 years after the first, to wit 1911).

We call the court's attention to the fact that this report referred to "Estimated true value as of January 1, 1920, and per cent. of same represented by Digest as finally approved by Tax Commissioner, of country real estate only."

It then sets out the "estimated true value" and then the "estimated" per cent. at which the same appeared to have been assessed for the 155 counties there listed. Adding these averages of percentages, makes a total of 9056 per cent; this divided by the 155 counties listed would make the mean percentage 58 66-100 per cent.

So clearly, if these figures of Fulbright were to be followed, then the court would not have been authorized to enjoin more than 41 34-100 per cent. of the tax executions.

We come next to the address of H. J. Fulbright, State Tax Commissioner, (print page 217), for the year 1919, two years later than the last year of Steed's assessment 1917, and 8 years later than the year of his first assessment 1911. If this was to be accepted as a criterion, then Fulbright's estimate of percentage for the year 1919, was 32 6-10 per cent. So if the admitted market value of all property for each year (reasoning backward which cannot be done *Corbin vs. U. S.* 181 *Fed.* 304; and authorities cited, *Coulter vs. L. & R. Co.* 196 *U. S.* 609, 49 *L. E. at* 618) was the same and was to be assessed at this percentage then the following would be the approximate result:

(1911)

Assessment made by Steed (Print page 25)....	$1,000,866.87
Less error Bannk Stock as per stipulation (Print page 239).....	62,000.00
Admitted Value	$ 938,866.87
Figured at 32 6-10 per cent. valuation	$ 305,370.58
Tax Rate for 1911 $1.35—in tax, ...	$4,112.49
Int. from Dec. 20, 1911 to June 20, 1923, ...	$3,022.75
Total tax and innterest at 32 6-10 per cent.	$7,135.24
Valuation fixed by award adopted by decree for this year:	
Tax	$1,522.40
Interest on award	$ 821.80
Total	$2,344.20
Even figured at 32 6-10 per cent. valuation for this year it would have amounted to this difference	$4,791.04

(1912)

Assessment made by Steed (Print page 25)	$1,399,161.67	
Less error National Bank Stock as per stipulation (Print page 239)	$ 61,675.00	
Admitted value	$1,337,486.67	
Figured at 32 6-10 per cent. valuation	$ 430,023.65	
Tax rate for 1912 $1.35 in tax		$ 5,805.31
Interest from Dec. 20, 1912 to June 20, 1923		$ 4,673.25
Total in tax and innterest at 32 6-10 per cent.		$10,478.56
Valuation fixed by award, adopted by decree for this year:		
Tax	$2,086.43	
Interest	$ 980.00	
Total	$3,067.17	
Difference between decree and 32 6-10 per cent. valuation for 1912		$7,411.39

(1913)

Assessment made by Steed (Print page 25)	$1,558,300.83	
Less Error National Bank Stock as per Stipulation (Print page 239)	$ 61,560.00	
	$1,496,740.83	
Less Error addition as per stipulation (Print page 240)	$ 212,395.00	
Admitted Value	$1,284,345.83	
Figured at 32 6-10 per cent. valuation	$ 418,696.53	
Tax Rate for 1913 $1.46—in tax		$6,112.96
Int. from Dec. 20, 1913 to June 20, 1923		$4,074.55
Total tax and innterest at 32 6-10 per cent.		$10,187.51

Valuation fixed by award adopted by decree for this year:		
Tax		$2,743.75
Interest		$1,096.30
Total		$3,840.15
Difference between decree and 32 6-10 per cent. valuation for 1913		$6,346.46

(1914)

Assessment made by Steed (Print page 25)	$1,548,735.38	
Less Error National Bank Stock	$ 57,020.00	
Admitted Value	$1,491,715.38	
Figured at 32 6-10 per cent. valuation	$ 486,300.22	
Tax Rate for 1914 $1.39—in tax		$ 6,759.57
Int from Dec. 20, 1914 to June 20, 1923		$ 4,385.04
Total tax and interest at 32 6-10 per cent		$11,144.61
Valuation fixed by award, adopted by decree:		
Tax	$2,698.53	
Interest	$ 889.37	
Total	$3,587.90	
Difference between decree and 32 6-10 per cent. valuation for 1912		$ 7,556.71

(1915)

Assessment made by Steed (Print page 25)	$1,439,160.83	
Less Error National Bank Stock as per stipulation (Print page 239)	$ 61,780.00	
Admitted Value	$1,377,380.83	
Figured at 32 6-10 per cent. valuation	$ 449,026.15	
Tax Rate for 1915, $1.46—in tax		$ 6,555.78

Interest from Dec. 20, 1915 to June 20, 1923		$ 4,917.83
Total tax and interest at 32 6-10 per cent		$11,473.51
Valuation fixed by award, adopted by decree:		
Tax	$2,776.96	
Interest	$ 720.85	
Total	$3,497.81	
Difference between award decree and 32 6-10 per cent. valuation		$ 7,975.80

(1916)

Assessment made by Steed (Print page 25)	$1,509,936.00	
Less Error National Bank Stock as per stipulation (Print page 239)	$ 65,725.00	
Admitted Value	1,444,211.00	
Figured at 32 6-10 per cent valuation	$ 460,802.38	
Tax Rate for 1916, $1.48—in tax		$ 6,891.87
Interest from Dec. 20, 1916 to June 20, 1923		$ 3,580.13
Total tax and interest at 32 6-10 per cennt		$10,472.00
Valuation fixed by award, adopted by decree:		
Tax	$4,457.51	
Interest	$ 845.55	
Total	$5,202.56	

(1917)

Assessment made by Steed (Print page 25)	$1,623,567.52	
Less Error National Bank Stock	$ 99,150.00	
	$1,524,417.52	
Less Error as per stipulation (Prinnt page 239)	$ 53,683.00	
Admitted value	$1,470,734.52	

Figured at 32 6-10 per cennt. valuation	$ 486,960.11	
Tax Rate for 1917, $1.57—in tax		$ 7,645.27
Interest from Dec. 20, 1917 to June 20, 1923		$ 3,488.54
Total tax and interest at 32 6-10 per cent		$11,133.81
Valuation fixed by award, adopted by decree		
Tax		$5,664.77
Interest		$ 677.34
Total		$6,342.14
Difference between decree and 32 6-10 per cent. valuation		$ 4,791.67

To recapitulate,—State Tax and innterest as would have resulted using Fulbright's estimate of 32 6-10 valuation:

1911	$ 7,135.24
1912	10,478.56
1913	10,187.51
1914	11,144.61
1915	11,473.61
1916	10,472.00
1917	11,133.81
	$72,025.34
Total amount of decree-award with interest down to Sept. 25, 1922, the date as fixed by decree	$33,862.10
	$38,163.24

Now as stated, if we accept the average percentage of Fulbright for the year 1919 of 32 6-10 per cent. and reason backward and presume that the same percentage values prevailed in 1911, 1912, 1913, 1914, 1915, 1916 and 1917, the years in question, and also presume that such was the result of a rule inaugurated by the tax officers of Georgia, it will be seen that the decree falls short of the State's dues some $38,163.24.

While we do not for a moment concede that any such reasoning should be "indulged in a case like this", nevertheless if it is, the decree cannot stand.

To advert to Fulbright's Report for the year 1920 (print page 212); if this be accepted as the proper criterion it will be seen, if complainannt be assessed at the percentage as estimated there for Richmond County, only 50 per cent. could possibly have been allowed him. And if we add the total averages of percentage for all the counties there listed 155, the result would be 9056 per cent. and then divide this result by 155, we would get a mean average of 58 66-100 per cent. so it will be seen that he could not possibly be allowed a reduction of more than 41 34-100 per cent. In other words, the percentage at which his property should have been assessed according to that report would be, 58 66-100 per cent. This percentage is almost double the "estimated average" for 1919 of Fulbright, so if that report of 1920 furnished the proper criterion, then the decree-award deprived the State of something like $70,000.00 or $75,000.00.

Moreover if complainant is given the very lowest percentage valuation which appears in Fulbright's "Estimated True Value as of January 1st, 1920" (Print page 212),three years after Steed's last and nine years after his first assessment, it will be seen that that was 27 per cent. and appears to be Houston County (see prinnt page 214). This is 5 6-10 per cent below his "estimated" average for the year 1919 of 32 6-10 per cent. So if we take this 5 6-10 per cent. off of the total tax and interest

figured on t 32 6-10 per cent valuation of	$72,025.34
This amount would be	4,020.96
This would leave	$68,004.38
Now deduct the amount of award-decree, including interest to September 25, 1922	$33,862.10
And this would leave	$34,142.28

So give complainant the fullest benefit of the very lowest "estimate" of any one of the 155 counties, and the State losses the above amount, if the decree stands.

The burden was upon complainant to produce evidence so strong that would "justify an exact conclusion," and not having done so, he should have been cast in the suit.

For it has been "Ordained by the Constitution; Prescribed by Statue; and, Declared by Judicial Construction" in Georgia, that all property must be returned and assessed for taxation at its "fair market value". So where one assumes the role of breaking down these provisions of a State revenue system by alleging that her tax officers have so administered those laws as to deny him privileges guaranteed under the Fed. Constitution, he must prove his assertion—to "all intents and purposes as *no latitude of intention* should be indulged in a case like this. There should be *certainty* to *every intent*,—and no *fact* should be *omitted* to *make it out completely.*" It would be hard to find language more explicit than this, Ah Sinn vs. Wittman, supra.

Then follows abstracts of inventories of some 18 estates (print pages 218-21). These inventories simply gave the amount of property which the several decedants seemed to own on the date of their deaths. But whether the same was owned on any of the taxable dates for any of the years 1911 to 1917 and what its value was, is not given. Even so, how can it be said that because 18 folks escaped, that complainant by showing this fact proves that discrimination inhibited by the 14th amendment to the Constitution of the United States. We apprehend not.

Next comes the affidavit of James P. Verdery, one of the members of the Board of Equalizers for current taxes, (print page 221). This affidavit states this board had understood that Callaway, Executor, might take the position that these securities were not taxable; that he as Chairman obtained an opinion from attorneys who said they were taxable, but which attorneys cited to said Board the case of Greene vs. Louisville &Interurban Railway Co., 244 U. S., 499 etc.; that after receiving said letter and

having said Executor before them, this Board assessed said securities in the aggregate at $250,000.00 for the year 1918 (7 years after Steed's first assessment and 1 year after 1917). It then proceeded, that from the best information he could obtain such assessment was at a higher rate percentage of the full values thereof than the percentage of *the returns* of similar classes of property *as made* by the tax payers of Georgia bore to the full market value for th eseveral years in question; that it was a fact well known not only to the people generally, but to the executive and tax officials of the State, and to members of the General Assembly that said class of securities were not generally returned for taxation by the owners and when returned, then at only a mere nominal percentage of their full value.

Let's for a moment analize this affidavit. In the first place, it is wholly without probative value. It gives merely the opinion of affiant. There is no data stated on which to base such an opinion as that the assessment as made by this Board was at a higher rate of percentage value than the rate at which the taxpayers of Georgia *had returned* their property. What was that percentage value? What was the value of such property throughout the State, or Richmond County? It does not state. Then again it states that the Board had been advised not to discriminate against the estate of White, yet, if this affidavit is true, the Board did that very thing, for it states that the assessment at $250,000.00 was at a higher valuation than that placed upon like property *by tax payers* when *they* returned similar property; if so, then the members of that Board violated their duty in making the assessment it did. So how can such an affidavit aid complainant. There are no facts given upon which to base the assertionns made. *Where is the data that the tax officials, the Governor, or the Members of the Legislature had any such knowledge as impuuted to them,* except the bold assertion. *Did he so inform them? He does not say. Then how can he swear that they had such knowledge.* And suppose they had, how could it be used by complainant in face of the ruling in Florida Central R. R. Co. vs. Reynolds, Supra? Moreover, some 85 or more of the tax

officials, the Comptroller-General of the State, and the State Tax Commissioner and Steed the Tax Receiver who made the assessment *denied unqualifiedly* that such was true.

Surely this affidavit could form no basis for a Federal Court's injunction againnst the tax executions in question.

Then we come to the affidavit of H. R. DeJarnette, (Print page 222). This affidavit stated that affiant was a member of a Special Tax Commission appointed by the Governor under an Act of the General Assembly of August 20, 1918, which commission made its report June 1, 1919. Now how can the result of a survey for a year, two years after the last year for which the assessments in question were made, and eight years after the first year, be taken as proof that Steed, Tax Receiver violated his oath of office and the Constitution of the State of Georgia, and of the Fourteenth Amendment to the Constitution of the United States, *when he made the assessments he did for the years* 1911 *to* 1917. We say it cannot properly be so used.

This affidavit is wholly lacking in probative value. For witness, its assertion *"that it was impossible to obtain any definite or accurate information as to intangible property owned by the tax payers of Georgia*.....that deponent and other members of the Commission were *confronted with the lack of statistics from any source, showing the aggregate amount of stocks and bonds owned by the tax payers of Georgia."* He then proceeds, "but from inquiries made of brokers and others, *he was of the opinion* that the aggregate amount of such property as *shown* by the *Comptroller General's reports for* 1918 did not represent more than 5 per cent of the full aggregate value." etc. Now this was wholly a guess. If the "brokers and others" whom this Commission consulted knew any facts, they should have brought before the Court to give the facts in their possession under oath. What they may have told affiant's commission, if anything, was purely hearsay and surely could not form the basis of a Federal Court's injunction to enjoin State Tax Officers in the collection of state taxes.

We come now to the several affidavits (P. 223, etc.) introduced by complainant consisting of 3 from Morgan County, 3 from Wilkes County; 3 from Floyd County; 3 from Habersham County 3from Coweta County; 3 from Chatham County; 1 from Richmond County, (besides his own, and the joint affidavit of Bussey & Howard, and H. K. Lowery and J. P. Verdery hereinabove discussed); 3 from Bibb County; 3 from McDuffie County; 3 from Putnam County; 3 from Troupe County; 3 from Columbia County, and 3 from Burke County. All of which were practically identical. In them, each affiant copied certain figures from the several reports of the Comptroller-General, and gave as their "opinion" that these figures did not represent more than 10 per cent. of personality and 5 per cent. of stocks and bonds as was owned in the several cvounties in which they resided. They did not give the amount of such property; nor the owners thereof, or its market value, on any single taxable date for a single year between 1911 and 1917, or any other year for that matter. None of these affidavits stated that any uniform systematic rule ~~was~~ of what it was ~~was shown~~. Nor did they give any data as to how much property was owned in any one County or the whole State and its assessed valuation.

Is it possible that a man who has continuously and deliberately refused to make a return of a million and a half dollars worth of taxable property, and when the tax officers discovered that he is such tax defaulter, and demand a return of such property for taxation, he can refuse to do so, and then by producing 3 affidavits from 13 counties out of 160 of the character of the affidavits above referred to, and succeed in having a Federal Court of Equity on such character of proof enjoin State Revenues? If this can be done, then indeed have States been annihilated.

Of the three million inhabitants of Georgia, doubtless there are 200,000 to 300,000 tax payes therein who regularly returned and paid their taxes for 1911 to 1917; and there are 160 counties therein, and from this number of tax payers and this number of counties, complainant produced only 39 affidavits from only 13 counties, *and even these gave no data showing what was the value*

of the property of all the vast number of tax payers in Georgia; or what they returned or failed to return. In fact they contained no data from which it could be determined to what extent, if any, complainant had been discriminated against, or, that any rule existed among the tax officers whereby the property of this vast number of tax payers was assessed at anything less than the law required.

Analysis of Paragraph Five of Decree of the Lower Court on Question of Discrimination.

We shall attempt to show the untenable reasoning of the court as expressed in this portion of the decree. In the first few lines thereof it says:

"The evidence is voluminous, and in some material matters contradictory. A discussion of it in detail would probably prove of but litle value. I entertain no doubt from the evidence (all of which we have set out in substance hereinabove) that the fixed principals controlling the officers in Richmond County who assess for tax purposes are that no property is assessed for tax purposes at its true market value, and that bonds and stocks are never assessed at above 50 per cent. of their value." In the first place it is submitted that the evidence did not legally authorize such a conclusion. Some 85 or 90 tax officers from all parts of the State; the Comptroller General of the State and Fulbright, State Tax Commissioner testified to the contrary, as did the Tax Receiver who made the assessments, (see print pages 242-4); and in the second place we submit, that, if the evidence did legally establish such conclusion, then, certainly the Court should not have enjoined more than 50 per cent of the executions. Continuing the Court said, "that it is common practice throughout the State and acquiesced in by the taxing authorities, for bonds and stocks of non-resident corporations to be not returned at all or at a very small percentage of their market value"; here we again say that legal proof was lacking. The tax officials contradicted this fact, and it has been judicially declared that such was not the policy of the laws of Georgia. Georgia Railroad & Banking Co. vs. Wright, 125 Ga., 605;—then continuing, "that easy opportunity

was afforded the taxing authorities of Richmond County to learn of other estates which were as liable, though in smaller amounts, as the White Estate; that no proceedings were had against but one of them and that was *settled* for 30 or 33 cents on the dollar; and that these facts were known to the Tax Receiver of Richmond County when the assessments against the White Estate were made." We respectfully submit again that the legal proof of such fact was wholly lacking. Steed, Tax Receiver denied any such knowledge, (print pages 201-3, and pages 242-3). Moreover, if such fact was conclusively proven this could not afford complainant any relief. It will be noted that the Court states that the other estates were "in smaller amounts". Then, we submit that this itself might excuse any proceedings against them, for this court in speaking of the failure of the legislature of a State to make provision for the collection of back taxes from railroads, while making no provision for such collection from individuals said: "It may have found that the railroad delinquent tax was large, and the delinquent tax on other property was small, and not worth the trouble of special provision therefor." *Florida Central R. R. Co. vs. Reynolds*, 183 *U. S.*, 746, 46 *L. E.*, 243.

Durham Pub. Co. vs. City of Durham 261 *U. S.* 149, 67 *L. E.* 580.

It is submitted that a like presumption might be indulged in favor of the sworn tax officers of a State. But whether such a presumption be indulged or not, the court fell into error in his reasoning for, quoting further from the above decision of this Court, it said "If taxes are to be regarded as mere debts, then the effort of the State to collect from one debtor is not prejudiced by its failure to make like effort to collect from another. And if regarded in the truer light as a contribution to the support of government, then it does not lie in the mouth of one called upon to make his contribution to complain that some other person has not been coerced into like contribution." It is evident that the lower court thought that *it did* "lie in the mouth of one called upon to make his contribution to complain that some other person has (had) not been coerced into like contribution." As it then

proceeded, *"With this knowledge the assessment against the White Estate at the true market value was knowingly, wilfully and intentionally administering 'the law so as to place upon one person .....a burden from which another person.....similarly situated is relieved'."* We here most respectfully insist that the learned court wholly misconceived the evidence, there was no proof of *"this knowledge"* as stated and the Court also misconceived the rule of evidence governing the character of proof necessary to establish such fact as stated. The evidence did not authorize such a "conclusion". Indeed the Court in the very next sentence exonerates the laws of Georgia as well as the tax officers. He says, "I have not overlooked the requirement of the Statutes that prop- "erty must be returned or assessed at its true market value; that "tax officers claim not to be responsible for false returns; that "the Comptroller General urges that the law be complied with; "and that the *tax receiver of Richmond County and tax receivers "elsewhere state that there is no systematic, uniform system of "taxing any kind of property at less than its true market value."*

If this was true, the Court is in error in the conclusions first stated and should not have penalized the State when neither it, through its legislation, or the conduct of its officers was at fault? Further the court said: "But the evidence not only warrants, but practically demands, *the conclusion known of all men*, That, if the Estate of White be required to pay taxes on bonds and stocks of non-resident corporations at their true market value, this estate will be discriminated against as compared with every other citizen of this County in like situation during the years for which taxes are sought, whether for current taxes or past taxes. Thus convinced, I am bound to grant protection against such discrimination."

By what criterion should the issue of discrimination be decided. By the rule of law as laid down by this Court, or, by such a rule as a "conclusion known of all men"? The Court stated in its decision that "the evidence not only warrants, but practically demands the conclusion known of all men, and, that if the Estate of White be required to pay taxes on bonds and stocks of non-

resident corporations at their fair market value, this Estate would be discriminated against as compaired with every other citizen in this County in like situation during the years for which taxes are sought, whether for current taxes or past taxes." This assertion by the Court would seem to indicate that the Court's mind was not altogether free from the "common observation" referred to in *Cumming vs. Merchants National Bank,* 101 *U. S.* 153-155, 25 *L. E.*, 903-4, and explained in the case of New York *Clearing House Building Company vs. Barker,* 179 *U. S.*, 279, 286, 45 *L. E.*, 190, 194. But such "common observation" is not the rule by which courts of equity are governed in determining whether *discrimination* has been practiced, *and to what extent* for no decree can properly be based upon anything less than "facts which had been pleaded and testimony to sustain which has been duly given" as only such can form "the basis of judicial action" (*New York vs. Barker, supra*). And such facts should be properly introduced in evidence. (*U. S. vs. Aberline R. Co. Adv. Sheets Supreme Court reports May* 22, 1924, 68 L. E. 393). In the Cummings case when the quotation referred to was used this Court, after reciting what the evidence showed, said "all this is uncontradicted," in other words the fact of discrimination was there established by competent evidence produced before the Court. "Common observation" cannot be a substitute therefor, as what is "known of all men" or "Common observation" can never form "the basis of judicial action," (*New York Clearing House Bldg. Co. vs. Barker, supra*). On what did "all men" base their "conclusion"? The Court further said, to tax the Estate of White at fair market value would be to discriminate against him as "compared with every other citizen of this County." We would ask, by what was this "comparison" made? "Every other citizen of this County", came not before the Court and gave testimony; the value of the property of "every other citizen of this County" was not proven; what the assessed value of the property of "every other citizen of this County" was was not shown. The Court itself had just asserted that the law required all property to be "assessed at true market value; that taxing officers claimed not to be responsible for false returns; that the Comptroller

General urges that the law be complied with; and that the tax receiver of Richmond County, and tax receivers elsewhere (some eighty-five in number) stated that there was no systematic, uniform system of taxing any kind of property at less than its true market value". These sworn officers of the law, who were before the Court, therefore did not concur in the "conclusion known of all men" as stated by the Court. It is respectfully submitted, that the lower court refuted its own premise in two distinct instances: First, by asserting the denial by the State tax officers as above quoted; and second, by the following: "Had the Estate of White already paid such an amount that the enforcement of any additional amount would be discrimination? This cannot be answered with confidence. There is not sufficient evidence to justify a positive and exact conclusion".

Mr. Justice Holmes in the Coulter case, 196 U. S., 599, at the bottom of page 609, said: "There is, no doubt, a natural inclination to think such an undervaluation probable when it is suggested. *But what is the proof?"* It is the *proof* and only the *proof* that the Court looks to, as "On appeal from a decree in equity, the appelate Court must weigh the evidence and determine whether on such evidence the decree is right," *Van Iderstine vs. Nat. Discount Co.* 174 *Fed.* 517, *affirmed* 227 *U. S.* 575, 57 *L. E.* 652.

In the Coulter case supra, this Court reversed the lower court for lack of "proof.." In that case, the evidnece, we respectfully submit, was indeed much stronger than in the case sub judice. We would especially invite the Court's attention to the evidence in that case reported in 131 Fed. 282, for comparison.

The rule is that such discrimination must be proven to "all intents and purposes;" (*Georgia Railroad & Banking Co. vs. Wright,* 125 *Ga.,* 605; *Ah Sinn vs. Wittman,* 198 *U. S.,* 500, 49 *L. E.,* 1142; *New York vs. Barker,* 179 *U. S.,* 279, 45 *L. E.,* 190); and by evidence *"clear, and convincing, and which conclusively preponderates over opposing evidence"; (Louisville Trust Co. vs. Stone,* 107 *Fed.,* 305); *and which should be "clear, unequivocal and convincining," and the same "can not be done upon a bare pre-*

ponderance of evidence which leaves the issue in doubt"; (United States vs. Budd, 144 *U. S.,* 154, 36 *L. E.,* 384); *indeed "no fact should be omitted to make it out completely"; (Ah Sinn vs. Wittman,* 198 *U. S.,* 500, 49 *L. E.,* 1142).

That such issue was left "in doubt" is fully shown by the language of the lower court in its very next deliverance:

"Had the Estate of White paid such an amount that the enforcement of any additional amount would be a discrimination? This *cannot* be *answered* with *confidence.* There *is not sufficient evidence to justify a positive* and *exact conclusion."* Having been left in this "dilemma" the court should have refused the injunction.

The Court then proceeded: "The only tribunal that has attempted to reach such *conclusion* is the *Board of Arbitrators,* whose *authority* in the *premises* has *been denied,* but whose *investigations* and *conclusions* can nevertheless be *properly* used as *an aid.."* In the first place this was the question which the lower court was called upon to decide, and we again assert that it had the same evidence before it as did that illegal Board of Arbitrators, and yet said, "There is not sufficient evidence to justify a positive and exact conclusion". The learned court then for lack of evidence turned to the illegal award of this illegal Board of Arbitration and rested its decree thereon in the following language "Upon the payment of the taxes fixed by the Board I am satisfied that there will have been paid much more than the average and probably more than any but a very few tax payers in Richmond County on that class of property."

That this was erroneous it is most respectfully submitted. If the award was "void" it was nothing, and something cannot come from nothing. *Freeman on Judgments, 4th Edition, Sec.* 170; *Hopkins vs. Clemson Agricultural College,* 221 *U. S.,* 636, 55 *L. E.* 890; *Russell vs. First National Bank,* 56 *Southern,* 868. After this deliverance, the court then proceeded: "But the significant fact is that for the year 1918 the Board of Assessors of said County (who had no authority except for the current year, State

vs. Callaway, 150 Ga., 232) assessed this class of property of the White Estate at about 18 per cent., while the Board of Arbitrators (which was a myth in law) for 1917 valued such property for taxation at about 24 per cent., and the average of percentages fixed by the Board of Arbitrators for the seven years for which taxes are sought was something over 16 per cent. reckoning on White's equity." It is submitted that there can be no 'reckoning on White's equity under the Georgia laws, *Central of Ga. Ry. Co. vs. Wright* 166 *Fed.*, 153; 124 *Ga.*, 630, and that, what this Board of Equalizers, who could only act upon current taxes, did, for a wholly different year was not of any probative value in the premises....this is illustrated by the fact that the Court did not follow its assessment. The record discloses that Callaway, Executor was before that Board and no doubt contending with it that no taxes were due because White was an alien, etc., and threatening proceedings in the Federal Courts to enjoin any attempt to assess such property at any other amount than that he graciously conceded he would be willing to contribute towards defraying the burden of State Government. This observation we based on the affidavit of Jas P. Verdery, (Print page 211-2), and the actions of complainant.

Moreover, as stated, this was a wholly distinct tribunal from Steed, Tax Receiver, acting within sphere of authority in assessing property which had been intentionally withheld from taxation by its owner; so if Callaway, Executor, succeeded in obtaining a different result from such Board than he did from the Tax Receiver, Steed certainly this is no reason for holding that Steed violated his oath of office in making the assessments he did upon the sworn and uncontradicted evidence he had before him. Surely, the action of that Board, under the circumstances, was no legal evidence of that unconstitutional discrimination as inhibited by the Fourteenth Amendment to the Constitution of the United States; and such action of that Board was no proper support for the decree of the learned District Court in this case.

The Constitution and laws of Georgia prescribe that all property in Georgia shall be assessed at its fair market value and this is so recognized by the lower court, for it so declared as quoted above. This being true how can his reasoning be reconciled? We assert it cannot be.

What right had the Board of Assessors, if it be conceded that its action was properly admissible, to reckon on any 18 per cent. valuation, or the Board of Arbitrators to reckon on any 24 per cent. valuation of White's equities, or any 16 per cent. of actual value. We assert none. Therefore it is submitted that even if such was true, this could be no justification for the decree entered.

Absolute equality and uniformity in the enforcement of tax laws cannot be obtained, but it is not mere inequality that the courts will enjoin; it must be a willful, deliberate discrimination against one as contradistinguished from the treatment of all others, and he who alleges such discrimination in the very nature of things is required to prove the same to all intents and purposes, and it is also encumbent upon such person to prove to what extent the discrimination has been practiced.

In the instant case the complainant wholly failed to make any such clear proof. We quote against the lower court's language with reference to the evidence, (Print page 198):

> "The evidence is voluminous, and in some material matters contradictory. A discussion of it in detail would probably prove of but little value. I entertain no doubt from the evidence that the fixed principles controlling the officers in Richmond County who assess for tax purposes are that no property is assessed for tax purposes at its true market value, and that bonds and stocks are never assessed at above 50 per cent. of their value....."

Then, if this were conclusively proven by the evidence, certainly the Court should not have gone further and enjoined the executions for more than 50 per cent. thereof. And then further on in the decision the court said:

> "Had the estate of White already paid such an amount that the enforcement of any additional amount would be a

discrimination? This cannot be answered with confidence. There is not sufficient evidence to justify a positive and exact conclusion....."

And with the evidence leaving him thus in doubt and confusion, he then turned to what he stated was "the conclusion known of all men" and enjoined the executions. These character of cases can not be tried by such a "conclusion". This is fully sustained by numerous decisions, among which may be cited the following:

New York vs. Barker, 179 *U. S.,* 279, 45 *L. E.,*190.

Ah Sinn vs. Wittman, 198 *U. S.,* 500, 49 *L. E.,* 1142.

Georgia Railroad vs. Wright, 125 *Ga.,* 605.

Sunday Lake Iron Co. vs. Wakefield, 247 *U. S.,* 350, 62 *L. E.* 1154.

U. S. vs. American Bell Tel. Co. 167, *U. S.* 224, 42 *L. E.* 144.

Louisville Trust Company vs. Stone, 107 *Fed.,* 305.

United States vs. Budd, 144 *U. S.,* 154, 36 *L. E.,* 385

Southern Rwy. Co. vs. Watts, 260 *U. S.,* 519, 67 *L. E.,* 375.

Geddes vs. Anaconda Copper Mining Co., 254 *U. S.,* 590, 65 *L. E., page* 425.

Bankers Trust Co. vs. Blodgett, 260 *U. S.* 647, 67 *L. E.* 439

Patton vs. Texas Pacific R. Co. 179 *U. S.* 658, 45 *L. E.* 361.

Midland Valley R. R. Co. vs. Fulgham, 181 *Fed. Fed.* 51.

United States vs. Ross, 92 *U. S.* 281, 23 *L. E.,* 707.

Manning vs. Mutual Life Ins. Co., 100 *U. S.* 693, 25 *L. E.* 761.

Moreover, how stands complainant under the well established rule that his pleadings and his evidence will be construed most strongly against him? As stated if the allegations of his petition as to discrimination were admitted, he could not claim more than a one-third reduction.

Now if it be conceded that the evidence he introduced proved discrimination (which of course is not done), which part should

be taken, the highest or lowest estimate of percentage assessment? It must be conceded by all fair minds, the highest. If this be true, then Steed's testimony given its most liberal interpretation certainly would authorize no more than a one-third reduction; or, if we take Fulbright's report for the year 1920, then the highest there was 60 per cent. for Muscogee County (Print page 214); or, give him Richmond County (Print page 215) that was 50 per cent; or, give him the lowest of all, 32 6-10 per cent. as estimated by Fulbright for 1919 (Print page 217), and the Decree can not stand. What right has one who is seeking to break down the State's right to collect its revenue to produce some four or five different "guesses" and leave the Court to grope in darkness? We assert none. (Patton vs. Texas Pc. Ry. Co. 179 U. S. 658, 45 L. E. 361. Midland Valley R. Co. vs. Fulgham 181 Fed. at 95. Ohio County Ry. vs. Baird 181 Fed. at p 51).

The significant fact is that the lower Court did not follow any of the evidence offered by complainant except the finding of the illegal board of arbitration. The responsibility of determining the question of discrimination could not properly be shifted to the findings of such illegal and void tribunal and one that could not exist.

The sixth and last assignment of error in the record, is as follows.

> "6. Because, when complainant's claim with reference to the legality of the arbitration proceedings being final and conclusive against the taxing authorities, is laid aside, it will be seen by reference to his bill that he would have only been entitled to enjoin the excess beyond fifty per cent. had he conclusively proven the same, as witness, the following language from paragraph 55 thereof; 'That the Tax Receiver of said County, claims that neither he, as Tax Receiver, nor the County Board of Assessors, ever assessed any property at its full value but tried to assess real estate at 66 2-3 per cent. of its value, and money, notes, and securities, where returned, at fifty per cent. of its value.' And therefore, appellants say, that if the evidence established any discrimination, clearly it was palpably error for the lower court to grant any relief further than that

contended for, and enjoin the executions in question for more than fifty per cent. of the value of the property."

In view of the fact that in the discussion of the other assignments of error, and especially the fifth assignment, we have also covered this assignment, we shall not repeat the same hereunder.

If the allegations of the complaint are taken as true, we most respectfully insist the judgment of the lower court *went even further than the relief which complainant* alleged he was entitled to and in his proof he completely failed *to prove*, even to this extent.

We now take up the fourth assignment of error in the record.

IV.

Evidence of Respondents, Appellees Wholly Refuted Any Claim of Discrimination.

This assignment of error is as follows:

Because the evidence offered by appellants, respondents in the lower court wholly refuted any claim made by appellee, complainant therein, as to any illegal, unconstitutional discrimination being practiced against him, which summary in brief was: (We omit this part here as a discussion of the evidence will follow), Print page 281.

We have devoted most of our brief and argument hereinabove to the rules of law governing the burden of proof, and the character of evidence necessary to prove discrimination, and the failure on the part of complainant to do so..

We beg now in conclusion to call the Court's attention to the evidence of appellants, respondents in the court below. It is respectfully submitted that this proof wholly overcame the weight of any evidence offered by complainant, appellee, in substantiation of any alleged discrimination.

The court will observe that the complainant did not even attempt to rebut the evidence offered by the respondents.

We shall for the moment advert to this proof:

(1) We call the court's attention to the depositions of J. B. Clews (Print pages 240-2), which evidence proved conclusively the ownership of the property by White on the several taxable dates for the years in question.

(2) The affidavit of McPherson and Dugal, who testified as to the value of these securities (Print pages 114-122), all of which was nowhere disputed by a single witness.

(3) Evidence of Marcus S. Baker, (Print page 242), in which he testified that he was tax receiver of Chatham County, and that since his incumbency of such office, he had sought to carry out the instructions of the Comptroller General, touching the collection of taxes; that wherever it had come to his knowledge that intangible personal property was owned by tax payers of his county, which had not been returned for taxes, he had proceeded to assess the same as required by law; that he had recently collected in Chatham County a large amount of taxes from the estates of decedants who had failed to make proper returns during their lives; that he knew of no systematic, uniform custom prevailing among the tax receivers of the State, whereby property was assessed at any uniform percentage of its value. (Uncontradicted).

(4) Evidence of Steed, Tax Receiver of Richmond County, (P. 242) who swore that he had been receiver for fifteen years, and since his incumbency of the office, had always sought to tax stocks and bonds at their fair market value, so far as it had been within his power; that he had no personal knowledge of any such personal property, or the owners thereof, who had withheld the same from taxation, nor had he any such information during the years 1911 to 1917; that had such information been furnished him, he would have required a return for the purpose of taxation, as he had in the White matter; that wherever property had been returned at $10,000, he assessed the same at that figure; that while he had exhibited to him the affidavit of E. H. Callaway, dated September 18, 1922, touching property owned by certain decedents named, that no information had been furnished him

touching the amount of property which they owned, which would authorize him to have required a return thereof for any previous years, and for all he knew, none of said property was owned on any of the taxable dates for the years 1911 to 1917; that if he had been furnished with evidence which would have satisfied him of the ownership and the kind and value of the property on the taxable dates for any previous years, he would have required a return thereof as was done in the assessment of the White estate; that it was only after he had been convinced of the ownership of the property of White, the character thereof and the value thereof on the taxable dates for the years in question, did he act against said estate and assess the same, and not then until after he had sworn evidence submitted to him as to the ownership and value thereof on the taxable dates, which was not disputed; that he would do the same against any other estate, or the owners of such property, where he had furnished him such information as was furnished him in that instance; that he had not uniformly, and systematically discriminated against the said White Estate, but that he had treated said estate and the executor thereof in the same manner as he would treat any other executor with like information before him. (Not rebutted).

(5) Then evidence of M. C. B. Holley, (Print page 244) in which he denied any knowledge of the ownership of property owned by the several parties, summaries of whose estate were introduced in evidence; that if there had been furnished the Board of Commissioners of Roads and Revenues of Richmond County such information as was furnished it touching the taxation of the property of the Estate of White, he would have instructed the Tax Receiver to assess such property for back taxes in the same manner as was done in the White Estate; that the information touching the White Estate was that White was a multi-millionaire, worth some three million dollars, and that his tax returns for the years 1911 to 1917 showed that he only returned in personal property $300 worth of household and kitchen furniture, and when he died, it developed that he had some million and a half dollars worth of stocks and bonds subject to taxation, which had not

been returned, and such Board employed Pierce Brothers, as its attorneys for the purpose of enforcing the collection of said taxes; that under such information, it would act in like manner against other tax payers, etc. (Uncontradicted).

(6) Then an affidavit of Benj. E. .Pierce, who denied the discrimination alleged etc., (Print pages 244-5). Not impeached).

(7) Next, the evidence of Wm. A. Wright, who swore that he was Comptroller General of the State, and had been for more than thirty years, and as such had general supervision of all tax receivers and issued them his yearly instructions touching their duties in the collection of taxes due the State; that in each year he had always sought to impress upon the tax receivers, their duty under the law to see to it that all persons owning stocks and bonds in foreign corporations, moneys, notes and accounts, as well as other property, be made to make returns thereof at their fair market value for taxation; that he had never countenanced any of the tax receivers of the State to allow any tax payer to return his property at any percentage of its value, and had no knowledge that such had been done. So far as his office was concerned, there had never been any concerted effort to tax property in any other manner except as provided by law. (Print page 245). (Undisputed).

(8) The several reports for the years in question, and in each of these reports the Comptroller General instructed the several tax receivers over the State as follows:

> "Strive to secure fair and honest returns of property at its fair market value from every tax payer in your County.....Shares of stock of all non-resident corporations owned by citizens of this State, whether held in or outside of this State, are by the Constitution of this State made subject to State and County taxation, and you are instructed to require them returned to you for taxation. Should the owners of any such stocks, fail or refuse to make return of them, claiming that they are not subject to taxation, your duty is to assess them and place them on the digest of your County.....Upon you devolves the im-

portant duty of seeing that each tax payer returns his property on the same basis for the purpose of being taxed thereon, and that basis is the one fixed by law, i. e. at its true and full market value. There exists many difficulties which will meet you in your attempt to make parties return their property on this basis, but your duty is plain and you can in a great degree, with the assistance of your grand juries, correct this evil so prevailent.....Read and study this law carefully, and see to it that every tax payer is required to return his property as the law requires." (Print page 245-6).

(9) Evidence of H. J. Fulbright, State Tax Commissioner (Print page 246-7), wherein he stated he was familiar with the method of taxing property in Georgia; that the constitution and laws required all property to be returned for taxation at its fair market value, which was arrived at, as a rule by the return of the tax payer under oath; that there was no uniform, systematic method existing among the tax officials of the State of taxing property at any percentage of its fair market value, but where property was returned at being worth $1,000,000.00, the same was assessed at 100 per cent., and that the rate of taxation throughout the State was uniform and applied to all property; that while there may have been a number of tax defaulters in the State—persons who did not make any returns of their property, or when making a return, did not disclose all of their property subject to taxation, but that none of these practices were inaugurated by the taxing officials, nor are such practices encouraged by them; that the taxing officials cannot know even approximately, the number of shares of stocks and bonds concealed and not returned for taxation, or the value thereof, but that where they did know of such property which had not been returned and taxed, they insisted upon its being returned; that he was not aware of any uniform, systematic practice of allowing stocks and bonds where they were known to exist, to escape taxation; and that while it was true that one of the troubles he and all other taxing officials had to contend with, was the failure of the tax payers to disclose their intangible property subject to taxation; that they did not know who had such property, and who not, and after they knew

of it, that the tax laws were enforced against such property and its owners in like manner as all other property; that instead of there being any uniform systematic system allowing stocks and bonds to escape taxation, it was the policy of the taxing officials to have that class of property assessed, whenever the inheritance tax appraisements disclosed that it had been omited from returns for that purpose by the owners thereof; that there was no uniform, systematic discrimination practiced in taxing one kind of property at one rate and another kind at another rate; that it was impossible for the tax receivers over the State to at all times know whether the tax payers were telling the truth when they swore to their returns, or not; that if some tax payers made oath that their property was of a certain market value, and other tax payers gave a different value of their's, that was not the action of the tax official but of the tax payers themselves; that *instead of there being any uniform, systematic rule of discrimination practiced by the taxing officials of the State, if discrimination did exist, it was due to the tax payers themselves and not to the tax laws of the State, nor to the action of the tax officials thereof.* (Not contradicted).

(10) Then followed the evidence of 85 tax receivers from 85 separate counties throughout the State, all of whom swore, that since their incumbency of office, they had always sought to carry out the instructions of the Comptroller General of the State in reference to assessing personal property such as stocks and bonds in foreign corporations at their fair market value, as far as it had been in their power to do so; that they had no knowledge of any such personal property, nor the owners thereof, which had been withheld from taxation by such owners; that they knew of no uniform, systematic rule in the State whereby the tax receivers had uniformly assessed such property at any percentage of its value, and to the best of their knowledge, such a system did not exist, (Print page 247-9). (No rebuttal).

When this evidence from State Officers, none of which is impeached, is laid over against the evidence offered by complainant, we submit that the same conclusively refuted even any and all insinuations of discrimination.

We therefore, respectfully submit that under no view of the record in this case should the decision of the lower court be allowed to stand. If the States can be hampered and enjoined in the collection of their revenues on such flimsy evidence as produced by complainant in this case, then indeed have the States fallen upon evil days, because it would be utterly impossible for them to maintain their respective governments for lack of revenue if such a rule is established.

If one is allowed to secrete his taxable property, refuse to return the same for taxation, become an admitted tax defaulter, as did Mr. White during his life, (and which was persisted in by his Executor after his death), and when *it is* discovered that he owns such property and he is called upon to return the same for taxation he can refuse to do so, and instead raise the hue and cry of illegal, unconstitutional discrimination, and succeed in getting away with the character of proof as that in this record; then why should *any one return any property at all?* In other words, *why should he not take the chance of escaping taxation altogether and when it is discovered that he owns property subject to taxation which he has secreted, and a demand is made for a return thereof for taxation, advance the defence that because others had done likewise and had not been discovered, that he be allowed to go free, or, if not free, that the State be compelled to take that which he by virtue of his generosity, might be willing to pay, and if the same is refused, then resort to a Federal Court to compell it to do so, and succeed on such proof. Whither are we drifting?*

We respectfully submit that no such rule can be sanctioned by the courts; yet, to affirm the decree of the lower court in this case would be to do this very thing. Indeed, "no such easy method of paying taxes has yet been promulgated by law. *Harber vs. Welchell* 156 *Ga.* 601.

In the case of *Payne vs. Coursey*, 20 *Ga.*, 588, the supreme court of Georgia, had this to say with reference to a *"fraudulent tax payer."*

> *"The smuggler defrauds the Government, but cheapens the commodity to his neighbor; whereas, the fraudulent tax payer, and they abound in every community, saddles his neighbors and fellow citizens with that which under a false oath, he withholds from Caesar."*

We respectfully call the attention of the court to the following statements in the brief of counsel for appellee, filed in response to the motion to dismiss in this case, which we contend are not supported by the record.

1. On page 55, counsel say: "But counsel representing the tax officials in this cause, without in any manner denying the facts, undertook to avoid the consequences thereof, first by introducing the affidavits of Steed, etc." This statement is erroneous; appellants made an unqualified denial of any such conduct as charged both in the response (P. 37-74) and by the evidence (P. 242-249).

2. The statement of counsel for appellee, as to the conduct of counsel for the taxing authorities; the imputation to them of doing the "osthich trick", and of their "having undertaken to shift the burden on the County Commissioners"; that the Chairman of that Commission "undertook to protect the attorneys which he had employed"; and also "undertook to relieve from his attorneys the burden of discrimination in the case," all appearing on pages 59-62, are wholly gratuitous and foreign to the issues in this case.

3. Again on page 66, counsel make this statement with reference to attorneys for the State and taxing officials: "But there were no employed attorneys on a percentage contract, appearing for either the State or County Commissioners of Richmond County before the Board of Tax Assessors, when they made their assessments in this case, and that Board was unquestionably treating the Estate of White, like it treated all other tax payers, whether tax defaulters or not, and there was really equal protection of the laws." Counsel omit to state that he, Callaway, Executor *was* present on the occasion referred to—and doubtless used all the influence at his command to reduce the assessments

for the year 1918, a year not in issue here. The affidavit of Verdery, print page 221, shows that Callaway was present.

4. On page 72, it is said: "Some one or two of them (referring to affidavits introduced by complainant) testified that they actually knew of some individual citizens in their County who owned more taxable stocks and bonds than were actually returned for the entire County, and one or two of them made a similar affidavit in reference to the return of money and solvent debts". Counsel are in error in this statement. *There are no such affidavits in the record.* All affidavits introduced by complainant gave merely an opinion, and contained no traversable facts; abstracts thereof appear on pages 222-238 in th erecord,—all of these were duly objected to when offered in evidence. (See assignments of error, P. 279-280.

5. Again on page 75: "It is respectfively submitted that the evidence introduced by the complainant ~~in the complainant~~ in the Bill, overwhelmingly sustained the charge of discrimination against the Estate of White in making the assessments *at more than the full market value*, and that the affidavits introduced by the State Tax Officials and the County Tax Receivers, was nothing more than mere camouflage, and in no instance denied the actual facts charged, but relied upon the fact that they did not know, of their own personal knowledge, of the ownership of said taxable securities by the taxpayers. It is respectfully submitted that there are none so blind as those who will not see".,This charge, we submit, is unfounded and contrary to the evidence,—to charge that public officers were attempting to "camouflage their conduct" is no substitute for the proof required by law from complainant, nor excuse for his refusal to return for taxation the securities called for, and owned by White. Florida Central Rwy. Co. vs. Reynolds, supra; Bankers Trust Company, vs. Blodgett, 260 U. S., 647, 67 L. E., 439.

6. Then on page 81, they state: "It is conceded that returns and assessments of all classes of property in Georgia, were at a very low percentage of their value". There is no evidence or admissions in the record authorizing such assertion; no one made

any such "concession". On the contrary, this was denied in the verified responses of the taxing authorities (P. 37-74), and by some eighty-five or more public tax officials (P. 274-249).

The report referred to, immediately following the language quoted, was the report of a commission, which had been appointed by the Governor in 1918 to consider tax conditions. It was not an official document returned by sworn officers; and was made subsequent to any year now in question. Furthermore, it gave no facts, but merely expressed an opinion, stating *that it was impossible to obtain any definite or accurate information as to intangible property owned by the tax payers of Georgia, as statistics were available;* that those comprising such commission were "unable to form any *well-grounded conclusions as to the value of money, notes and accounts, bonds and taxable stocks in the State.*" (P. 158 and P. 222).

7. On page 85, this statement appears: "Again we have found in none of the cases cited, where the proof overwhelmingly established the proposition of knowingly, wilful, and intentional discrimination, as appears here against the Estate of White in the proceeding against it for the collection of back taxes, and the deliberate refusal by the officers and attorneys in charge of this proceeding, to proceed against anyone of more than a hundred other estates in the county, owning the same class of securities, who have not returned the same, and where the *attorneys and officials admit the facts,* or at least *do not deny* the facts as established by certified copies from the records, and undertake to avoid the consequences thereof by shifting the responsibility *upon someone else*". This statement is not borne out by the record. There is no admission of any such "facts" as stated. The verified answers, and evidence of respondents expressly denied all such charges. The Chairman of the County Commissioners, the Tax Receiver of Richmond County, and attorney for the taxing authorities, each, and all denied having any information that would have authorized any assessment for back taxes against anyone of said estates as listed by said Callaway, Executor, (See Print 242 and P. 244). It will be noted that all the

information which counsel for appellee charges was in possession of the tax authorities of Richmond County, came from affidavits made by none other than Callaway, himself, and made during the pendency of this litigation,—and which contained no data that would have authorized any back tax assessments. The State has a lien for taxes on property owned on a certain date in each year. No such dates and ownership were given by Callaway. "It would be a startling proposition" (Georgia R. R. & Banking Co. vs. Wright, 125 Ga., 605) if a tax defaulter could escape payment of taxes due by him for any such reason. "No such early method of paying taxes has yet been promulgated by law". (Harbor vs. Welchel, 156 Ga., 601.) The statement that "the attorneys and officials admit the "facts", is wholly erroneous.

FROM THE FOREGOING DISCUSSION OF THE FACTS, AND LAW APPLICABLE THERETO, IT IS RESPECTFULLY SUBMITTED THAT THE FOLLOWING RESULTS SHOULD FOLLOW:

1. Where the laws of a State create or designate tribunals for the correction or equalization of tax assessments, and confer upon such tribunals power to grant relief to aggrieved tax delinquents, it is to these tribunals that such dissatisfied tax payer must resort before appealing to a Federal Court of Equity. (*Altschul vs. Gittings*, 86 *Fed.*, 200; *Knights of Pythias vs. Myer*, 68*L. E.*, 486; *Northern Pacific R. R. Co. vs. Patterson* 154 *U. S.*, 130, 38 *L. E.*, 934). The Supreme Court of Georgia having decided in a litigation touching the assessments in this case, that the Executor of the delinquent tax payer in question, had ample opportunity and statutory remedy in the Courts of the State, as prescribed by the Act of 1918, page 232, and it appeared that such delinquent had not exhausted such statutory remedy, and that he had also refused to raise the questions he now seeks to raise in the State Courts, although he had the opportunity to do so and a Federal Court of Equity is thus met at the threshold of the case with such situation, such delinquent tax payer will not be heard to complain that he is being discriminated against by the State, or its officials, in violation of the Fourteenth Amendments to the

Constitution of the United States, although it might appear, that complainant had been assessed, and might be compelled to pay taxes, upon a valuation, in excess of that put upon other property in the same County, (*First National Bank vs. Board of Commissioners, Weld County*, 68 *L. E.*, 406). Complainant having failed to avail himself of the statutory remedies provided by the law, he has no just ground for complaint, that he is being denied constitutional rights, in violation of the Fourteenth Amendment to the Constitution of the United States, as under such circumstances, "the discrimination of which he complains could arise only from his own neglect," (*Canadian Railroad Co. vs. Eggen*, 252, *U. S.*, 561, 64 *L. E.*, 716).

2. *A delinquent tax payer* is bound to follow the remedies provided by a State statute, if he is dissatisfied with assessments made upon omitted property, where such statute prescribes due process of law, as do the Statutes of Georgia, and if he neglects to do so, and selects the wrong tribunal in which to raise any question of excessiveness and thus allows assessments made to become final and conclusive against him, he will not be heard to complain, (*McGregor vs. Hogan*, 263 *U. S.*, 234, 68 *L. E.*, 26). Under the Georgia law, it is prescribed that assessments made by the tax receiver against a delinquent tax payer shall *become final within twenty days from the receipt of the notice of such assessments unless the delinquent within that time raises the question of excessiveness.* The Act of 1918, page 232, did not repeal this provision of the Act of 1910,, page 27, quoted above, but only *repealed* the *remedy* by *arbitration.* The delinquent tax payer should have raised the question of excessiveness *within twenty days* from the receipt of the notice of the assessment against him, in the State Court litigation through which this case has been, or in the proper tribunal prescribed by the Act of 1918, to wit, in the Superior Court of Richmond County, and not having done so, he thus allowed the assessments to become final against him, and should not now be heard to complain in a Federal Court of Equity that he is being inviduously discriminated against in violation of the Fourteenth Amendment to the Constitution of

the United States; especially when it appears from the undisputed facts that the assessments complained of were made after due notice, and at the valuation prescribed by the Constitution and laws of Georgia, and which valuation was not denied.

3. Where a bill in equity fails to allege under any head of equitable jurisdiction, such as that complainant owns real estate, the title to which is clouded by tax executions; or that complainant would be subjected to a multiplicity of suits; or, facts which would show irreparable injury, it should be dismissed; the fact that such bill alleges that there had been included a small amount of National Bank Stock, by comparison with the other property which had been assessed through error, would not authorize a Federal Court to retain jurisdiction of such bill.

4. Where one seeks the benefits of a Court of Equity he should first do equity, and where a delinquent tax payer admits that he is liable for some taxes upon property which had been assessed, he should first pay that amount, or tender the same unqualifiedly before resorting to a court of equity; he cannot first resort to a court of equity and then for the first time offer to do equity; (the decree of the lower court held in effect that this had not been done by complainant for it stated that the amount which was paid during the trial of the case should have been paid some three years earlier than it was paid). In other words, a complainant's cause of action must be complete at and before filing his bill, and he cannot save a dismissal thereof by offering for the first time to do equity on a final hearing. (*Hollingsworth vs. Flint*, 101 *U. S.*, 591, 25 *L. E.*, 1028).

5. A Federal Court has no appellate jurisdiction and therefore cannot review, set aside, or establish a State Supreme Court decision; any errors therein, or any construction adverse to the Constitutional or Federal rights of a litigant can only be corrected by such litigant by writ of error, to the Supreme Court of the United States. The bill in this case was in effect an effort to accomplish such results, and should have been dismissed on motion in the nature of a demurrer properly filed. (*Roocker vs. Fidelity Trust Co.*, 263 *U. S.*, 413).

6. Where one failed to do equity or at the time he files a bill in a Federal Court seeking equitable relief, no evidence should be received to show discrimination on behalf of a delinquent tax payer, for the reason, that having failed to do equity, the court cannot lend its ear to such party, and especially is this true when the party complaining is a delinquent tax payer who admits that he owes the State some taxes. (*Los Angeles County vs. Ballerino* 32*Pac.*, 581).

7. The assessments complained of having been made in *July* 1919, and the same submitted to arbitration under an agreement between the Tax Receiver of a County and the complaining delinquent tax payer, in September thereafter, some fourteen months after the passage of the Act of 1918 *page* 232, hereinabove quoted from, which Act of 1918, provided the remedy that is, by petition in equity, by the dissatisfied delinquent tax payer for having such assessments corrected because excessive. It therefore follows that the procedure for arbitration of tax assessments claimend by delinquents to be excessive, in force prior to the enactment of such Act of 1918, are by it repealed. Therefore the arbitration proceedings for the assessment of property for taxation here involved and the award returned by such an arbitration board, was wholly void because at the time the arbitration agreement was entered into, there was no law authorizing a tax receiver to enter into such arbitration agreement, as the right to arbitrate depends either upon an express statute, or the right to dispose of one's property, and a tax receiver has no power to bind the State, unless by express statutory enactment, and is wholly without authority to contract away the State's right of taxation. (*State vs. Callaway*, 152 *Ga.*, 871; *District of Columbia vs. Bailie* 171 *U. S.*, 161, 43 *L. E.*, 118; *Giles V. Vette* 68 *L. E.* 181, *Article* 4, *Sec.* 1, *Par.* 1 *Constitution of Ga. Code, Sec.* 6462). Therefore the records of the State Court suits touching such award were not properly admissible in evidence as res adjudicata (Print 201), on behalf of such delinquent tax payer, complaining in a Federal Court of Equity, who sought to have that court fix finally and conclusively the amount of taxes he should pay at the

amount so fixed by such illegal and void award, and such award being utterly void, it was not admissible in evidence upon the ground of discrimination; it was wholly without probative value and should have been repressed when properly objected to (Print 253).

8. A State tax assessing officer will not be heard to give evidence, (Print 202) which would tend to impeach assessments which had been made by him upon omitted property, at the instance of a complaining tax defaulter that he had been discriminated against, in violation of the Fourteenth Amendment to the Constitution of the United States. When such assessing officer made the assessments they passed beyond his controll and he will not be heard to give evidence which would tend to impeach them by testifying in effect that he never intended assessments to be final; that in starting out he would always make them at fair market value but when arbitration was demanded he would almost always settle on some lesser value, nor to the effect that there was a rule whereby property generally had not been assessed at more than 66 2-3 per cent. valuation when the law required assessments to be made a full value. If such a rule exists it must be proved from other sources, such a holding does not tend to repress the truth but rather to preserve the integrety of the Acts of Public officers. The objections urged against the admissibility of this evidence were well taken (Print 256), and should have been sustained.

9. An affidavit of a stock and bond broker, (Print 202), which *asserted merely an opinion* that there was owned by the various tax payers of certain Counties throughout a State, a much larger amount of stocks and bonds than the reports of the Comptroller General of the State showed had been returned for taxation; that in his opinion, figuring from such reports, they did not show more than ten per cent. thereof. But which affidavit contained no data showing who owned the same, what the value thereof was, and at what percentage of valuation it had been assessed for taxation; and which contained no data showing the entire amount of such property as was owned on the taxable

dates for the years in question in the several Counties, etc.; and that such knowledge was in possession of the taxing authorities, and with such knowledge, they had refused to assess such property, or had uniformly and systematically assessed the same at some percentage of its value, and if so, at what that percentage was. Such affidavit was not admissible on the trial of cause in Federal Court on behalf of a defaulting tax payer, who complained that he had been discriminated against, in violation of the Fourteenth Amendment to the Constitution of the United States, over proper objections urged thereto upon the trial by respondents, (Print 257).

10. Certain affidavits, (Print 202), giving the result of an examination of the records in the Clerk's Office of the Superior Court of a County in a State where deeds and mortgages are required to be recorded which state that there appeared uncancelled upon such records, a large amount of security deeds in the nature of mortgages on certain dates of certain years in question, but which did not contain any data as to who owned such property; that it had not been returned for taxation, or if returned, what percentage it had been returned or assessed at; nor that the tax officers of Richmond County knew who owned the same on the several taxable dates for the years in question; knew what the fair market value thereof was, and knowing this, deliberately refused to assess the same, or uniformly assessed it at some percentage of its value, and if so, at what percentage such assessment was made; were not admissible in evidence on behalf of a complaining tax payer, that he had been discriminated against in violation of the Fourteenth Amendment to the Constitution of the United States, by reason of the fact, as he contended, that he had been assessed at full fair market value, when others throughout the County were assessed at only a percentage valuation, over timely objections by respondents, (Print 260).

11. An affidavit giving the result of an examination of certain books of an Ordinary's Office (Print 261 and 266), and showing the amount of property which appeared to have been owned by some eighteen estates but which gave no facts as to whether or

not the owners of such property prior to their death had returned the same and paid taxes thereon, nor whether or not such property was owned by any of said decedants on any specific taxable dates, nor the market value thereof on such dates, nor at what valuation the same had been assessed by the tax officers during the years in question, nor that the tax officers knew of the existence of and the ownership of such property on any of the taxable dates for any of the years in question, or knowing of such, deliberately refused to assess the same, or assessed it at some percentage of its actual fair market value, and if so what that percentage was, was not admissible in evidence, on behalf of a complaining tax payer, that he was being discriminated against in violation of the Fourteenth Amendment to the Constitution of the United States, and on objection should have been repressed (Print 261 and 269).

12.. Certain reports of the Comptroller General of the State for the years 1911-1917 were offered by complainant, (Print 210 and 264). These merely gave what was the *total amount* of property which appeared to have been returned for taxation throughout the State, but contained no data as to what was the fair market value of any or all property as owned by any individual tax payer, or tax payers throughout the State, (fair market value being the value at which property is re quired to be taxed), nor what amount of stocks and bonds had been withheld from taxation. Said reports did not purport to deal with *unreturned property* of defaulting tax payers, and contained no data by which the fair market value of all property of any individual tax payer or all tax payers throughout the State could be estimated.—Such reports were not properly admissible in exidence over timely objections by defendant, (Print 262 and 269), on behalf of complainant, they did not show, nor tend to show that he had been arbitrarily and invidiously discriminated against in violation of the Fourteenth Amendment to the Constitution, and especially is this true when such reports were made years before the disclosure of the fact that the complaining tax payer was a delinquent or defaulting tax payer. .

13. Report of the State Tax Commissioner for 1919 (P. 269) and an address for the year 1920 were offered by complainant, (Print 217). In these he gave *an estimate* at what he considered the tax values bore to the fair market value throughout the State, as compiled by him from the digests sent in by the several tax receivers. These reports contained no data, which showed what was the fair market value of all such property throughout the State, nor the individual tax payers who owned such property, nor what amount of property was returned by the individual tax payers throughout the State, nor what amount had been left unreturned,—none such were admissible in evidence, over objections, (Print 265 and 269), on behalf of a complaining tax payer, that he had been discriminated against in violation of the Fourteenth Amendment of the Constitution of the United States, because they did not tend to show that he had been illegally assessed, when such assessment was made under the law at fair market value. Furthermore, these reports were for years subsequent to the years for which the assessments complained of had been made. For this reason also, said reports should have been rejected. Even evidence of what the assessed value of property was for any subsequent year would not be proof of what such valuation was for any previous year or years. A fact once proven to have existed may be presumed to have continued, but a fact proven to exist today, cannot be presumed to have existed for any previous length of time (*Corbin & Company vs. United States*, 181 *Fed.*, 296 (3); *Coulter vs. L. & N. R. R.*, 196 *U. S., at* 609, 49*L. E.*, at 612.

14. The assessment of a Tax Equalization Board for a wholly different and subsequent year to any of the years about which complaint was made, was not properly admissible in evidence, over timely objections, (P. 267) in an effort to show that assessments made upon omitted property for previous years by another taxing authority under different circumstances, were discriminatory; what an assessment board for a wholly subsequent and different year did, or did not do, cannot be used as proof that another assessing officer or Board had violated his or its duty in

making assessments for previous years upon omitted property. Assessing officers are presumed to do their duty, and such evidence will not be received to impeach such presumption, for there can be no reasoning backward, so to speak. A fact proven to exist may be presumed to continue, but a fact proven to exist today is no proof that that fact existed yesterday, or last year.

15. An affidavit (Print 202 and 144), of what was the amount of indebtedness of a tax payer, was not properly admissible in evidence, over objections, (Print 268), as no deduction for such indebtedness is allowed in returning property for taxation in Georgia. The fact that such property might have been held as security for indebtedness did not change its situs, taxibility, or valuation, so far as the laws of Georgia were concerned. (*Central of Georgia R. R. vs. Wright*, 124 *Ga.* 630. *Same vs. Same and* 166 *Fed.* 153).

16. The report of a State Tax Commission (Print 157 and 268), appointed by the Governor of a State *for a subsequent year, than* that about which complaint is made of certain assessments upon omitted property by a State's assessing officer, which gave the result of its investigation of tax matters throughout the State, was not admissible in evidence over proper objections, (Print 269), on behalf of a complaining tax payer, that he had been discriminated against, in violation of the Fourteenth Amendment to the Constitution of the United States, when such reports contained no data as to what was the fair market value of all such property throughout the State, nor the owners thereof, nor that such facts were known to the tax officials and they, knowing such facts, deliberately refused to assess such property, or assessed the same at any percentage of its valuation, and if so, at what percentage such assessments were made. What the investigation of such commission may have been as to property escaping taxation, is no proof that the assessing officer in this instance had discriminated against complainant in violation of such amendment. Neither was an affidavit of a member of such Tax Commission (Print 222 and 273), properly admissible in evidence on the trial of such cause over the objections urged thereto, (Print 274),

when it contained no data from which the Court could determine any question of discrimination, or to what extent such had been practiced, if at all, against the complaining tax payer in this case. Such report and affidavit gave merely an opinion and were wholly without probative value.

17. The fact that others may have escaped their just share of the burden o fState taxation by not returning their property at all, or by succeeding in getting the same accepted at a less valuation than it really was worth, is no defense to another tax payer when called upon to contribute his just share of taxation. Therefore abstracts of inventories of sundry estates of decedants (Print 218-21 and 270), showing what amount of property was owned by said several decedants at the dates of their death, but which contained no data of what all other property in the County was worth, nor at what it was returned for taxation or assessed at; and which did not show that said decedants owned said property on the *several taxable dates* for the years in question, nor what was the fair market value thereof on said taxable dates, and that such ownership and non-return was known to the tax officials of Richmond County, and with such information before them such officers deliberately refused to assess the same, or assessed it at only a percentage of its valuation, and if so, at what percentage of valuation such assessment was made, and that such conduct on the part of the tax officers was systematic and uniform; were subject to the objections urged thereto and should not have been admitted in evidence, (Print 271). Neither were the several tax returns (P. 218-221 and 271) of said decedants admissible in evidence, over timely objections (Print 271), on behalf of such complaining tax payer, for the reason that none of them contained any data which tended to show any unconstitutional discrimination against complainant.

18. Certain contracts between the State and its several subdivisions employing attorneys (P. 272), were without probative value, and contained no data which tended to establish any illegal, inviduous discrimination in violation of the Fourteenth Amend-

ment to the Constitution of the United States, and should have been repressed. (Print 272).

19. Affidavits of two members of a Tax Equalization Board, (Print 21-22 and 272), to the effect that they had assessed the same property upon which the assessments in question were made *for a subsequent year*, at a much smaller sum than that at which the assessments complained of were made, and that in their opinion the valuation placed upon such property by said Board was at a much higher percentage valuation than that placed upon like property by tax payers generally throughout the State, *when they returned* such property for taxation; that in their *opinion, reckoning* from figures shown by the Comptroller General's reports of the State, for the years in question, the same did not represent more than ten per cent. of such property as was owned throughout the State, but which affidavits contained *no data as to what was the fair market value* of such property as was owned in the County of complainant's residence, nor throughout the State, and who the owners of such property were, and the *fair market* value thereof *on the taxable dates in question*, and that the tax officials of Richmond County knew and were in possession of such data, and being in possession thereof, deliberately refused to assess such property, or *assessed the same at only a percentage* of its value and if so what that percentage was; nor did said affidavits contain any *facts* which showed what percentage of valuation said Board of Equalization was *accustomed* to assessing property at, and to what extent the assessments complained of exceeded the general percentage at which such Board had *habitually* assessed like property; nor did they contain *any data*, which by *comparison*, would tend to show to *what extent* Complainant was discriminated against, if at all; it therefore follows that such affidavits were not admissible in evidence on behalf of a delinquent complaining tax payer, seeking relief upon alleged invidiuous discrimination in violation of the Fourteenth Amendment to the Constitution of the United States, and the same should have been repressed upon timely objections. (Print 273) made on the trial of the case below. (*Geddes vs. Anaconda Mining Co.* 254 *U. S.* 590, 65 *L. E.* 425).

20.. The several affidavits offered by complainant from thirteen Counties in Georgia (P. 223-38) asserted merely an opinion and contained *no data which showed what the fair market value of the class of property which had been assessed by the tax receiver in this case was, throughout the State, or in the several counties of affiants residence;* nor did they contain any *data* showing who owned such property on any specific taxable date for any of the years in question, nor the fair market value thereof; nor did such affidavits *state at what percentage valuation affiants had returned their property, nor at which it had been assessed; nor what amount of such property they owned which they had not returned; nor that the tax officials knew who owned such property and the value thereof on the several taxable dates during the years in question,* and with this knowledge, *systematically and uniformly refused to assess the same for taxation, or uniformly and systematically* assessed such property at any percentage of its actual fair market value, *and if so what such uniform systematic per cent. was.* Therefore they were not admissible, on behalf of a defaulting tax payer, seeking to enjoin State taxes upon the ground that he had been arbitrarily discriminated against in violation of the Fourteenth Amendment of the Constitution of the United States, over timely objections by respondents, (Print 226-41). Discrimination is a question of comparison, and before such comparison can be made, facts and figures must be given by which it can be determined, if such fact be true, and to what extent discrimination has been practiced, but discrimination cannot be *determined by conjecture.* As was said by Sanbourn, Circuit Judge of the Eighth Circuit, in *Midland Valley R. Co. vs. Fulgham,* 181 Fed., at 95, *"Conjecture is an unsound and unjust foundation for a verdict. Juries may not legally guess the money or property of one litigant to another."* If this be true with reference to the verdict of a jury and with reference to

transactions between individuals, then the same is much more true when it comes down to a question of conjecturing the State out of its taxes. Said affidavits referred to were only a *conjecture* or *guess*, or *opinion*, of the several affiants, and contained no facts upon which could properly be based an injunction by a Federal Court of Equity against State tax executions upon the complainant of inviduous discrimination.

21. Even if the evidence offered by complainant was admissible, the same was wholly insufficient to show illegal, inviduous, arbitrary, unconstitutional discrimination against complainant in violation of the Fourteenth Amendment to the Constitution of the United States. Where a delinquent tax payer complains in a *Federal Court* of Equity that he is being so discriminated against, *the burden of proof is upon him to show such inviduous and arbitrary discrimination to all intents and purposes, and no fact should b eomitted to prove the same, and such discrimination must be proven by evidence so strong as not to leave the court in doubt that, and the extent to which, discrimination has been practiced, this complainant failed to do as the lower court said that the evidence left it in doubt* (*Ah Sinn vs. Witman*, 198 *U. S.*, 500, 49 *L. E.*, 1142; *Georgia Railroad vs. Wright*, 125 *Ga.*, 605; *Louisville Trust Co. vs. Stone*, 107 *Fed.*, 305; *United States vs. Budd*, 144 *U. S.*, 154, 36 *L. E.*, 384; *Geddes vs. Anaconda Copper Mining Company*, 234 *U. S.*, 590, 65 *L. E.*, 425; *Davie vs. Briggs*, 97 *U. S.*, 628, 24 *L. E.* ,1086; *Patton vs. Texas Pa. R. C.*, 179, *U. S.* 658, 45 *L. E.*, 361; *Midland Valley & R. Co. vs. Fulgham*, 181 Fed. 95); It was therefore errer in the Court below in the absence of such proof by complainant, as stated by the Court, to then enjoin State taxes, basing such action upon an award which the *court itself had held illegal and void.*

Furthermore, the evidence offered by respondents, which stands unimpeached, wholly refuted any alleged claim of inviduous discrimination against the Fourteenth Amendment to the Constitution of the United States.

From the foregoing it is respectfully submitted that the decree of the lower court should be reversed.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1924

No. 171.

E. H. CALLAWAY, As Executor
of the Estate of J. B. White.

vs.

CHAS. S. BOHLER, Tax Collector
of Richmond County, Georgia.
C. A. STEED, Tax Receiver of
Richmond County, Georgia.
J. T. PLUNKETT, Sheriff of Richmond
County, Georgia.
STATE OF GEORGIA;
RICHMOND COUNTY and
BOARD OF EDUCATION, of
Richmond County, Georgia.

CROSS APPEAL

BRIEF OF

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Solicitors for Appellees.

The errors assigned in this court on the cross appeal (Print page 288) present in substance the following questions:

First

Did the court err in holding that the arbitration proceedings were not res adjudicata.

Second

Did the court err in holding that the Act of 1918, page 232, repealed the arbitration provisions of Park's Code of Georgia, Section 1116-(d)?

Third and Fourth

The third and fourth assignments of error together present but one question, to wit: Did the court err in holding that the Act of 1918, page 232, was constitutional?

Fifth, Sixth and *Seventh*

The fifth, sixth and seventh assignments of error in substance raise but one question, to wit; Did the court err in allowing interest on the amount of taxes as fixed by the Board of Arbitrators, which it practically adopted as its decree?

I.

Did the Court err in holding that the arbitration proceedings were not res adjudicata?

It is respectfully submitted that it did not. This ruling is fully supported by the authorities.

See the decision of Barrett, Judge, (print page 195-6).

In the decision of the *State vs. Callaway*, 152 *Ga.*, 871, the Supreme Court of Georgia declared this award to be void in the following language:

> "The arbitration proceedings were null and void under the Act of 1918."

This decision is binding upon the Federal Courts. The Supreme Court of Georgia has declared what the meaning of the Act of 1918, page 232 was, and as stated by the Supreme Court of the United States (in the very recent case decided April 28, 1924 of *Knights of Pythias vs. Meyer* reported in Advanced Sheet, 68 *L. E., page* 486). "Under the settled rule of this court *declared* so *frequently* and uniformly as to have become axiomatic,

we must accept this decision of the highest court of the State, *fixing the meaning of the State legislation, as though said meaning had been specifically expressed therein.....And we follow the State construction even though it may not agree with our own opinion."*

The foregoing case is also the latest deliverance on the question of res adjudicata, and we submit is authority for our position in this case. It is submitted here that the "thing adjudged" in the State Court suits plead as res adjudicata was wholly different from the case made by the bill. The first was merely the refusal of a temporary injunction to prevent the holding of the arbitration, in which the Act of 1918, page 232, was not referred to; and the second, was to set aside the award which was returned by such Board and the State Court simply held that such a proceeding was useless for the reason that such award was void because under the Act of 1918, page 232, no arbitration could be held touching the assessments in question, and therefore equity would not do a useless thing.

See *First National Bank of Greeley vs. Board of Commissioners,* 68 *L. E.,* 406, decided April 7th, 1924. This case cites numerous cases which had previously laid down the same rule.

The proposition that the State Court's decision was not res adjudicata, we submit is further sustained by the following cases:

Steed vs. Savage, 115 *Ga.,* 97.

Blocker vs. Boswell, 109 *Ga.,* 230.

Kirkman vs. Gillespie, 112 *Ga.,* 507.

Dix vs. Dix, 132 *Ga.,* 632..

Satterfield vs. Spier, 114 *Ga.,* 127.

Insurance Company vs. Atlanta, 151 *Ga.,* 153.

Black on Judgment, Vol. 2, *Sec.* 710.

15 *R. C. L. Judgments, Sec.* 320.

Seamster vs. Blackstock, 83 *Va.,* 232, 2 *S. E.,* 36.

II.

Did the court err in holding that the Act of 1918, *page* 232, *repealed the remedy of arbitration of delinquent tax payers as to excessiveness as previously existed under the Acts of* 1910, *P.* 27, ~~*as Confidence*~~ *so far as that class of which complainant was one—a delinquent—was concerned. Park's Code of Georgia, Section* 1116-(d)?

A casual reading of the Act of 1918, page 232 will demonstrate that this question must necessarily be answered in the negative. This act is quoted in full in the main brief, page 19.

Section 2 thereof is as follows:

> "Sec. 2. Be it further enacted, That when the owner of said property, or, if dead, his personal representative or representatives, refuses or fails to make returns in cases of property which should have been returned to the Comptroller General, the said Comptroller General shall notify, in writing, such owner or his personal representative or representatives of his delinquency, demanding that a return shall be made thereof within twenty days."

Section 5 thereof provides:

> "Sec. 5. Be it further enacted, That if the delinquent or his personal representative or representatives, as provided under Section 3 of this Act, refuses or fails to return such property after notice given him, it shall be the duty of the tax receiver to assess such property for taxation from the best information he can obtain as to its value for the years in default, and notify such delinquent of the valuation, which shall be final, unless the person or persons so notified raise the question that it is excessive, in which event the further procedure shall be by *petition in equity in the Superior Court of the County where such property is assessed.*"

The repealing clause thereof, Section 8, is as follows:

> "Sec. 8. Be it further enacted, That all laws and parts of laws in conflict with this Act be and the same are hereby repealed."

The difference between this Act and the old law, so far as this case is concerned is indicated by italics.

It has been held that where the latter of two acts cover the whole subject matter of the earlier one, and not purporting to amend the former, the latter Act will operate as a repeal of the earlier one. Certainly this Act covered the whole subject-matter.

Thornton vs. State, 5 *App.*, 397.

Opinion of Barrett, Judge. (Print page 196).

Then, if the Act of 1918, page 232, repealed the arbitration proceedings, no Board of Arbitrators could be called into existence, and the fact that it was done would have no effect upon the right of the State.

But, it is contended by counsel for appellee that the decision of the Supreme Court of Georgia did not have the effect of holding that the Act of 1918 repealed the arbitration provision of *Park's Code, Section* 1116-(d), etc., that the opinion of Fish and Hines who wrote the main opinion was obiter.

We respectfully insist that this contention is untenable.

The opinion of the case of *State vs. Callaway*, 152 *Ga.*, 871, (P. 176) which held the arbitration proceedings void, was written by Chief Justice Fish and Justice Hines, and it is respectfully submitted that their opinion contained the law of the case.

Along this line we cite the case of *Ogden vs. Sanders*, 12*th Wheaton*, 214, 6*th L. E.*, 606, explained in *Boyle vs. Zacharie*, 6 *Peters*, 348, 8 *L. E.*, 423.

Certainly the Georgia Courts, both superior and appellate, had before them and decided the question, that the award was void, the same having been rendered subsequent to the Act of 1918. The fact that the Act was not plead in the lower court, did not break the force of that decision.

Central of Georgia Rwy. Co. vs. Gwynes, 153, *Ga., page* 606.

Chicago, et al. vs. Board of Supervisors, 182 *Fed.*, 291.

Union Pacific vs. Mason City, 199 *U. S.*, 160, 50 *L. E.*, 134, 7 *R. C. L., page* 1005.

Atlantic Coast Line Ry. Co. vs. Holliday, 73 *Fla.*, 269 (17) So. 479. *Wadley So. Ry. Co. vs. Wright* 120 *S. E.* 551.

Furthermore, this award could in no sense be held to be an estoppel against the taxing authorities, for parties must take notice of the extent of authority of public authority.

Whiteside vs. U. S., 93 *U. S.*, 247, 23 *L. E.*, 882.

> "It is a well-settled principle that the State cannot be estopped from asserting its right, on account of negligence or illegal conduct of its officers, and can only be estopped by legislative act or resolution." Booth cs. State, 131 Ga. 750 (3), 759, 63 S. E. 502, 507.

> "Powers of all public officers are defined by law, and all persons must take notice thereof. The public cannot be estopped by the acts of any officer done in the exercise of a power not conferred." Civil Code 1910, p 303.

If the arbitration was void, Steed, nor no one else could bind the State by submitting the tax question to arbitration.

> "An award which is in contravention of the mandatory provisions of a Statute is incapable of being made effective by ratification, and, for that reason, can not by consent, confer upon courts jurisdiction of the subject-matter..... so as to enable the court to enforce the award under the statute." 3 Cyc., 718.

See also *Clements vs. Painter*, 46 *Ga.*, 487.

This is true for the reason that parties cannot confer jurisdiction of a subject-matter upon a court which has no jurisdiction thereof.

7R. C. L., page 1039.

Atlantic & Gulf R. R. Co. vs. Thos. Mann, 43 *Ga.*, 200.

> Moreover only "a person legally capable of making a disposition or release of his rights may make a submission of that right to arbitration.....but persons who

cannot bind themselves by contract, cannot submit to arbitration."

7 R. C. L., page 354.

See the case of *District of Columbia vs. Bailie,* 171 *U. S.,* 161, 43*L. E.,* 118, where this court fully discussed this question.

See also *Samuel H. Stone vs. Bank of Commerce,* 174 *U. S.,* 412, 43 *L. E.,* 1028.

Consent of parties can neither invalidate a law, nor revive one that is dead. *Faugera & Co. vs. New York,* 1 *A. L. R.,* 1473.

Therefore it is submitted that Steed could not revive the law codified in *Section* 1116-(d) *of the Code,* nor repeal the Act of 1918, page 232, by agreeing to submit the question touching the assessments made by him, to arbitration.

Gordon Admx. vs. United States, 7 Wal., 199, 19 *L. E.,* 35.

We respectfully submit that the ruling of the court on this question is clearly sustained by the authorities.

III. and *IV.*

The third and fourth assignments of error together present but one question, to wit: *Did the Court err in holding that the Act of* 1918, *page* 232, *was constitutional?*

It is respectfully submitted that the Act of 1918, was constitutional, and therefore the ruling of the court to this effect is also fully sustained by the authorities.

The point that this act was unconstitutional because it prescribed a different method for tax payers of complainants class cannot be maintained. The right to classify property or the method of how assessments shall be made has been declared time and again.

Georgia has made provision for that class who make a return for taxation, *Act of* 1913, *page* 123, and for defaulters by the Act of 1918, 232. This she had a perfect right to do.

Watson vs. State Comptroller 254 *U. S.*, 122, 65 *L. E.*, 170. *Crescent Cotton Oil Co. vs. State of Mississippi*, 257 *U. S.*, 129 66*L. E.*, 166. .

American Sugar Refining Co. vs. State of Louisiana, 179 *U. S.*, 89, 45 *L. E.*, 102.

The contention that the Act of 1918 was unconstitutional because it did not provide a method for the assessment of property, we submit cannot be sustained. Under the character of acts as that in question, it is not a question of a re-assessment at all, but the whole proposition is whether or not the tax payer can be relieved from that which he claims to be excessive, and if this can be done, and the Act prescribed due notice then, we submit there can be no successful attack theron on the ground of its unconstitutionality.

In *Hager vs. Reclamation District No.* 108, 111 *U. S.*, 701 28 *L. E.*, 569, this court said:

> "In some States, instead of a Board of Revision, or Equalization, the *assessment may be revised by proceedings in the Courts and by it corrected if erroneous, or set aside if invalid; or objection to the validity or amount of assessment may be taken when the attempt is made to enforce it. In such cases all the opportunity is given, to taxpayers to be heard respecting the assessment, which can be deemed essential to render the proceedings due process of law.*"

See also *Davidson vs. Board of Adm. of New Orleans*, 96 *U. S.* 105, 24 *L. E.* 619, *to the same effect.*

As to what tribunal the State will remit its tax payers for relief, is strictly a matter for it to determine. All the Federal Courts will look to is, do such provisions give the tax payer an opportunity to be heard before his property is actually sold for taxes, if so, this court will not interfere therewith..

Lewis vs. Wilson, 151 *U. S.*, 545, 38 *L. E.*, 266.

Williams vs. Board of Supervisors, 122 *U. S.*, 154, 30 *L. E.* 1088..

37 Cyc. 1134-(b).

King vs. Portland, 184 *U. S.*, 61, 46 *L. E.*, 431.

V, VI and *VII.*

The fifth, sixth and seventh assignments of error in substance raised but one question to wit: *Did the Court err in allowing interest on the amount of taxes as fixed by the Board of Arbitrators, which it practically adopted as its decree?*

There was nothing to have prevented a payment of the amount paid on September 25, 1922, on September 5, 1919. Plaintiff would not do so without a receipt in full, and of course, under the circumstances the tax collector would not give that. If complainant should have paid it, then the State was entitled to the use of the money from that date. Taxes bear interest in Georgia—Code 1910, 8878. Regardless of any strict legal rule as to charging interest on interest, there are instances even where interest can be charged on interest, even at law. A man gives a not due two years after date, the interest thereon is represented by interest notes due every six months—he defaults in his payments—these interest notes after maturity bear interest. In other words they then become principal notes. So it might be said of the taxes due the State at the end of each year—1911-1917.

It is therefore respectfully submitted that there was no error in the court as pointed out by appellee in his cross appeal, that would authorize a reversal of the court thereon.

Respectfully submitted.

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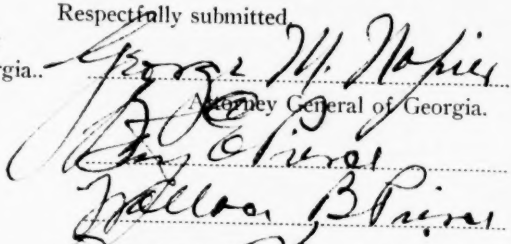

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

CHAS. S. BOHLER, Tax Collector of Richmond County, Georgia.
C. A. STEED, Tax Receiver of Richmond County, Georgia;
J. T. PLUNKETT, Sheriff of Richmond County, Georgia;
STATE OF GEORGIA;
RICHMOND COUNTY; and
BOARD OF EDUCATION of Richmond County, Georgia;

Appellants,

vs.

E. H. CALLAWAY, As Executor of the Estate of J. B. White,

Appellee.

Nos. 170 & 171

Appeal from United States District Court for the Southern District of Georgia, Northeastern Division.
In Equity

MOTION TO DISMISS OR AFFIRM ON CROSS APPEAL AND REVERSE ON MAIN APPEAL: OR TRANSFER TO THE SUMMARY DOCKET: OR ADVANCE SAID CAUSE FOR HEARING: AND BRIEF THEREON UNDER RULE SIX OF THE SUPREME COURT.

RESPONSE TO THE ABOVE STATED MOTIONS BY E. H. CALLAWAY EXECUTOR OF THE ESTATE OF J. B. WHITE, APPELLEE IN THE MAIN APPEAL AND APPELLANT IN THE CROSS-APPEAL.

By CALLAWAY & HOWARD, ATTORNEYS
AUGUSTA, GEORGIA

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

CHAS. S. BOHLER, Tax Collector of Richmond County, Georgia;
C. A. STEED, Tax Receiver of Richmond County, Georgia;
J. T. PLUNKETT, Sheriff of Richmond County, Georgia;
STATE OF GEORGIA;
RICHMOND COUNTY; and
BOARD OF EDUCATION of Richmond County, Georgia;

Appellants,

vs.

E. H. CALLAWAY, As Executor of the Estate of J. B. White,

Appellee.

Nos. 551-552.

Appeal from United States District Court for the Southern District of Georgia, Northeastern Division.
In Equity

MOTION TO DISMISS OR AFFIRM ON CROSS APPEAL AND REVERSE ON MAIN APPEAL: OR TRANSFER TO THE SUMMARY DOCKET: OR ADVANCE SAID CAUSE FOR HEARING: AND BRIEF THEREON UNDER RULE SIX OF THE SUPREME COURT.

RESPONSE TO THE ABOVE STATED MOTIONS BY E. H. CALLAWAY EXECUTOR OF THE ESTATE OF J. B. WHITE, APPELLEE IN THE MAIN APPEAL AND APPELLANT IN THE CROSS-APPEAL.

STATEMENT OF FACTS

This case deals with proceedings instituted against the estate of J. B. White in Richmond County, Georgia, to collect back taxes for the years from 1911 to 1917 inclusive, on certain stocks and bonds which had been held during said years by Henry Clews & Company, of New York, for the account of J. B. White.

White came to the United States from Ireland in 1866 and settled in Augusta, Georgia. Without ever having been naturalized, he left the United States in 1909 for Europe and never returned, but died at Genoa, Italy, on March 31st. 1917, leaving of force his will, wherein respondent was named as executor.

Before leaving the United States, he opened an account with Henry Clews & Company, of New York, who, under his instructions and orders, bought certain stocks and bonds for his account, White paying a part of the purchase price and Clews & Company furnishing the balance of the purchase money and taking the title to the stocks in their own name and retaining possession of the bonds,—Clews & Company carrying them on what is known as margins, for the account of White during the period named. The balance of the purchase price for the securities was paid to Clews & Company from time to time by the income from the securities, rents and purchase money received by White from sales of real estate in Augusta, Georgia, during said period. So that while the market value of the securities so held by Clews & Company on February 1st. 1911 amounted to apparently $1,012,366.67, White owed thereon at that time to Clews & Co. on the purchase price, $478,877.33. At the time of White's death in 1917 the securities had an apparent value of $1,375,408.70, and the entire indebtedness on the purchase price thereof had been paid to Clews, and White had a balance to his credit with Clews & Company on January 1st. 1917, of $8,367.70. (P. R. p. 143).

While White's agents in Augusta returned his large real estate holding in Augusta for State and County taxes, and paid all taxes required of him, the stocks and bonds held by Henry Clews & Co. of New York, now the subject of controversy, were not returned for taxation in Richmond County, Georgia, and during said years did not stand in the name of J. B. White. After the death of White, and the probate of his will, Clews & Company continued to hold the title to said stocks and the possession of said bonds for the account of the executor, in order to facilitate their transfer by the executor in the course of the administration of the estate; so that the executor never saw the securities, nor had them in his possession. But in compliance with the laws of Georgia, he included a statement of said securities so held by Henry Clews & Company, in the inventory of the estate of White. From this record of the inventory of said estate, counsel, representating the tax officials and the State and County in the present cause under a contract with the County Commissioners of Richmond County, obtained a list of said securities held by Henry Clews & Company and furnished the same to the Tax Receiver of said County with instructions that he demand of the executor the return of said securities for the years 1911 to 1917 inclusive, for taxation. Thereupon, the Tax Receiver issued the notice to the executor, but subsequently withdrew the same, being in doubt as to whether the securities were taxable or not for said years, or at what amounts they should be assessed for taxation. Thereupon, counsel, under their contract with the County Commissioners to collect back taxes upon a contingent fee, brought a mandamus proceeding in the Superior Court of Richmond County against the Tax Receiver, to compel him to assess said securities for taxation for said years, at the amounts named in said inventory, and in said proceeding undertook to make the executor a party defendant so as to bind him by such assessments. (P. R. p. 87-89).

Pending this proceeding counsel obtained a similar contract with the State for the collection of said taxes, and joined

the State as a party plaintiff in said cause. The court refused to make the executor a party defendant in said mandamus proceedings and refused to make the mandamus absolute. However, pending the mandamus proceeding, counsel took the testimony of Henry Clews & Company as to what securities they held for White during the years from 1911 to 1917 inclusive, and affidavits as to the value thereof, for each of said years, (P. R. p.88-89), and upon this information being furnished the Tax Receivr, on July 28th. 1919 he made the tax assessments against the estate of White for the years from 1911 to 1917, inclusive, upon all the securities so held by Clews & Company during said years, (P. R. p.26 to 29) not only for the full amount as stated in the valuing affidavits, but apparently negligently added to his assessment for the year 1913, $213,895., more than the alleged full value, and for the year 1917 negligently added $53,000. more than the alleged full value. ((P. R. p.239-240).

Included in these assessments was the alleged full value of 115 shares of the capital stock of the National Park Bank of New York, and 100 shares of the National Bank of Commerce of New York, both national banks, located in New York City, and the aggregate value of said stock for said years amount from $57,000. to $99,000. (P. R. p.116-122).
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ARBITRATION PROCEEDING

Upon receipt of notice from the Tax Receiver of these assessments, the executor wrote to the Tax Receiver complaining that the assessments were excessive, and demanding arbitration, as provided by the Code of Georgia, and named his arbitrator. (P. R. p29+30). The Tax Receiver thereupon appointed an arbitrator, and these two failing to agree upon an umpire, the matter was referred in a joint letter from the Executor and Tax Receiver to the Board of County Commissioners of Richmond County, as provided by the General Tax Arbitration Act of 1910, codified in Parks Code, Sec. 116-d, which Board of Commissioners appointed an umpire. (P. R. p.30+31).

These arbitrators, after being sworn by the Tax Receiver, arranged to convene for the hearing on September 2nd. 1919, and on the morning of September 2nd. 1919, counsel representing the State of Georgia presented a petition to the Judge of the Superior Court of said County seeking an injunction against the holding of said arbitration, on numerous grounds, and claiming and contending that the estate of White was not legally entitled to any arbitration and that the assessments should stand as made by the Receiver. (P. R. p86-92. This petition for injunction was refused by the Judge, exceptions were filed, and the same carried to the Supreme Court of Georgia where the decision refusing the injunction was affirmed (State of Georgia vs. Callaway, Executor, 150 Ga. 235), the relevant part of the headnote being as follows:

> "The proceeding substantially complied with the law applicable to the case of a taxpayer who had failed to return his property for taxation, who had been notified by the tax receiver to make a return, who had failed to comply with the notice, and whose property had been assessed by the tax receiver and who had accordingly demanded an arbitration."

After the Superior Court refused the injunction against holding the arbitration, both sides appeared before the Board of Arbitrators and introduced evidence and submitted argument, and the arbitrators thereupon, on the 2nd. of September 1919, made their award as follows: (P. R. p. 132).

For 1911	$112,744.83
For 1912	154,550.67
For 1913	187,927.98
For 1914	194,138.96
For 1915	190,202.74
For 1916	301,183.67
For 1917	360,813.92

This award, having been returned by the arbitrators, was delivered by them to C. A. Steed, Tax Receiver, and on the morning of September 3rd. 1919, he delivered the award, signed by the arbitrators, to the Tax Collector, Chas. S. Bohler, and the entire arbitration proceedings, including the

award, was immediately fastened in the tax digest of the County for the year 1917 and the Tax Collector calculated the taxes due on the awards for each of said years, and the interest to date thereon, to-wit: September 5th. 1919, and submitted the same to the Executor of White, who immediately tendered him the amount of the taxes as calculated by the Tax Collector, to-wit; $27,980.88, which, under advice of counsel representing the State, the Tax Collector declined to accept. (P. R. p.210).

On September 6th. 1919 counsel representing the State filed an equitable petition in the Superior Court of Richmond County, Georgia against the Executor of White, the three arbitrators, the Tax Collector, and Tax Receiver of the County, for the purpose of setting aside the award so made, and sought to have the same declared null and void as fraudulent in law, and as not being for the full value of the securities taxed, and as being so small in proportion to their contentions, as to amount to fraud. (P. R. p97-130). The Executor demurred to this petition, generally and specially, (P. R. p162-165), and upon the hearing the Judge of the Superior Court sustained the demurrer and dismissed the petition. (P. R. p. 165). Thereupon, counsel for the State excepted, and carried the case to the Supreme Court for review, and in a decision rendered by the Supreme Court in said case on the 4th. of March 1922, the decision of the Judge of the Superior Court sustaining the demurrer and dismissing the petition in said cause, was affirmed by four judges, two judges not participating. (P. R. p176-180).

While the Supreme Court of Georgia at that time consisted of six judges, two of the judges were absent on their vacations and two of the judges rendered an opinion that the award was a mere nullity, upon the ground that the Act of 1918 (Public Acts 1918 p. 232) repealed the General Arbitration Act of 1910, as codified in Parks' Code, Sec. 1116-d.

The Act of 1918 is as follows:

"An Act to provide for the collection of taxes due to the State, counties and municipalities and schools thereof, and for other purposes.

Section 1. Be it enacted by the General Assembly of the State of Georgia, and it is hereby enacted by authority of the same, That when the owner of property has omitted to return the same for taxation at the time and for the years the return should have been made, or having returned his property or part of same, has grossly undervalued the property returned, or his property has been assessed for taxation at a figure grossly below its true value, such owner, or, if dead, his personal representative or representatives, is required to return such property for taxation for each year he is delinquent, whether delinquency results from failure to return or from gross undervaluation, either by the delinquent or by assessors, said return to be made under the same laws, rules and regulations as existed during the year of said default, or said property was returned or assessed for taxation at figures grossly below its true value. Provided, that no lien for such taxes shall be enforced against any specific property which has been previously alienated or encumbered, and it is in the hands of innocent holders without notice.

Sec. 2. Be it further enacted, That when the owner of said property, or, if dead, his personal representative or representatives, refuses or fails to make returns in cases of property which should have been returned to the Comptroller-General, the said Comptroller-General shall notify, in writing, such owner or his personal representative or representatives of his delinquency, demanding that a return shall be made thereof within twenty days.

Sec. 3. Be it further enacted, That when such property is of that class which should be returned to the tax receiver of the county, the said tax receiver shall notify in writing such delinquent, or, if dead, his personal representative or representatives, of such delinquency, requiring that a return shall be made thereof within twenty days.

Sec. 4. Be it further enacted, That if the delinquent or his personal representative or representatives, as provided for in Section 2 of this Act. refuses or fails to return such property after the notice given, or returns it below what the Comptroller-General deems its value, it shall then be the duty of the Comptroller-General to assess such property for taxation for State, county, or municipal and school purposes, from the best information he can obtain as to its value, for each year in default, and notify such delinquent or his personal representative or representatives of the valuation, which valuation shall be final, unless the person or persons so notified raise the question that it is excessive, in which event the further procedure shall be as provided by Section 1045 of the Code of 1910.

Sec. 5. Be it further enacted, That if the delinquent or his personal representative or representatives, as provided under Section 3 of this Act, refuses or fails to return such property after notice given him, it shall be the duty of the tax receiver to assess such property for taxation from the best information he can obtain as to its value for the years in default, and notify such delinquent of the valuation, which shall be final, unless the person or persons so notified raise the question that it is excessive, in which event the further procedure shall be by petition in equity in the Superior Court of the county where such property is assessed.

Sec. 6. Be it further enacted, That if the delinquent under Section 2, disputes the taxability of such property, he may raise the question by petition in equity in the Superior Court of Fulton county, and if such delinquent be dead, his personal representative or representatives shall have the same right.

Sec. 7. Be it further enacted, That if the delinquent or his personal representative or representatives, under Section 3, disputes the taxability of such property, he may raise that question by petition in equity in the Superior Court of the county where said property is assessed.

Sec. 8. Be it further enacted, That all laws and parts of laws in conflict with this Act be and the same are hereby repealed.

Approved July 31, 1918."

Notwithstanding said two judges, to-wit: Messrs. Hines and Fish, held that the award was a mere nullity because the above recited Act repealed the Arbitration provisions of the General Tax Arbitration Act of 1910 under which the arbitration had been confessedly held, both by the tax receiver and the taxpayer, they affirmed the decision of the Judge of the Superior Court in sustaining the general demurrer and dismissing the equitable petition which had been brought in the name of the State of Georgia to set aside the award. The other two judges, to-wit: Judges Atkinson and Beck, each rendered separate decisions holding that the award was final and binding, and for that reason the Judge of the Superior Court was correct in sustaining the demurrer and dismissing the petition.

These two opinion are as follows:

> "Beck P. J. I concur in the judgment of affirmance in this case; though I doubt whether the provision in the Act of 1918, declaring when the alleged delinquent taxpayer may resort to equity, is applicable under the facts of the record. The petition in the present case is supplementary to the former original petition in which the petitioners sought to show that the proceedings before the arbitrators were illegal for certain specified reasons. Among the reasons specified, there was no claim that under the act of 1918 the arbitrators in this case could not entertain an appeal from the assessment made by the tax-receiver. But construing that original petition as a whole, it recognized the right of the taxpayer to have arbitration. Furthermore, the complainants participated in the arbitration, and can not now raise objections to the jurisdiction of the arbitrators, based upon the act of 1918, after having in their original petition recognized that the arbitrators would have had jurisdiction but for the reasons there pointed out. I also concur in the judgment of affirmance on the ground that equity will not afford the relief here sought, as the petitioners have a statutory remedy as pointed out above, even if the act of 1918 is applicable to this case.

"Atkinson, J., concurring. Construing the petition most strongly against the pleader, the sole ground of attack upon the award was that the valuation placed upon the property was so grossly inadequate as to show fraud upon the part of the arbitrators. The assignments of error in the bill of exceptions are limited to that question. Under the act by virtue of which the arbitration was had, Political Code Sec. 1116 (d), the arbitrators had jurisdiction, and their power was limited to the question of valuation of the property, and their decision was final. Valuation of property was necessarily a matter of opinion. It would require actual fraud or corruption on the part of the arbitrators, to set aside the award. In this view the allegations of the petition were insufficient to show fraud, and the court properly dismissed the petition on demurrer. In view of the record in the trial court and the assignments of error in the bill of exceptions, it is unnecessary to make a ruling as to the applicability or effect of the act of 1918."

This decision was rendered Saturday night, March 4th., the last day of the term, and the telegram from the Supreme Court announcing the affirmance of the decision did not give counsel for the Executor in that case any opportunity to learn of the obiter opinion of Messrs. Hines and Fish, nor to ask for and file an application for re-hearing before the whole court, under the rules of practice before the Supreme Court of Georgia.

Immediately following the rendering of this decision by the Supreme Court of Georgia, the Tax Collector, Chas. S. Bohler, at the instance of counsel representing the State in the former proceedings, and before the remittitur from the Supreme Court had been, or, under the rules, could be returned and made the judgment of the Superior Court of Richmond County, on March 9th., 1922, issued tax executions against the estate of White for the full amounts of the assessments made by the Tax Receiver on July 28th. 1919, including the assessments on the stocks in the national banks located in New York City, and also including the patent ex-

cesses and errors made in said assessments for the years 1913 and 1917, as specified above. (P. R. p.21, 25, 239). 240.

In like manner, since this decisoion was rendered, a preliminary injunction which had been granted by the Judge of the Superior Court in this proceeding against the Tax Collector accepting the taxes tendered, based upon the award of the arbitrators, and the supersedeas granted by said Judge upon the carrying of said case by bill of exceptions to the Supreme Court, had been dissolved by the affirmance of the decision of the Judge, the Executor of the estate of White again tendered to the Tax Collector of Richmond County the $27,980.88, the amount of taxes and interest as calculated by the Tax Collector on the award of said arbitrators to September 5th. 1919, and again said tender was refused. (P. R. p. 183).

These tax fi fas so issued by the Tax Collector for the full amount of said assessments, were immediately delivered by him to the Sheriff of the County, with instructions to levy the same, when this Bill was brought to enjoin the levies. The actual amount in controversy being in excess of $180,-000., and the Executor claiming that the only amount which he owed for taxes was the amount figured out by the Tax Collector when the award was rendered on September 2nd. 1919, and which was tendered to the Tax Collector by the Executor on September 5th. 1919, to-wit: $27,980.88, and the Executor still insisting that to be the correct amount of taxes owing on said securities sought to be back taxed, and that he should not be required to pay more than that, filed this Bill, (P. R. p. 1-32), seeking an interlocutory injunction against the enforcement of said tax fi fas against the estate of his testator in excess of the amount so tendered, and of which he made a continuous tender and offer to pay, and also seeking to have said tax fas enjoined.

FEDERAL JURISDICTIONAL QUESTIONS INVOLVED

In addition to the other issues raised by the Bill, the

following arise under the Constitution or laws of the United States: (P. R. p. 10, 11, 12).

1. The assessments upon which the tax fi fas were issued in this case, clearly and unquestionably covered the alleged full values of the stock owned by the estate of White in National banks located in the City of New York and State of New York, which was in express violation of U. S. Revised Statutes Sec. 5219, which prohibits the levy and assessment of taxes by States on stock in national banks not located in said States.

2. The Bill presents the question, clearly, of discrimination against the estate of White in the assessments, and the tax fi fas issued thereon, both as to quantity of the assessments and as to the individual, (P. R. p. 18, 19, 95), the allegations being that the assessments made upon the securities in question were grossly in excess of even the alleged full value of the securities, whereas in all other cases the same class of property in Georgia was not taxed at exceeding 10% of its full value, and in Richmond County at not exceeding 5% of its full value. In addition to this, the allegations of the Bill are that White's estate, out of a large number of other estates in Richmond County showing unreturned money, notes and credits and taxable stocks and bonds (as the same appear upon the inventories thereof in the office of the Ordinary of said County) is the only estate against which proceedings for the collection of back taxes have been instituted, notwithstanding the fact that the Tax Receiver and counsel for the tax officials in this case, were expressly notified in writing, at three different stages in this litigation, of the ownership of said securities by said estates, and the fact that they had not returned said securities for taxation during the same period for which back taxes were being collected from the estate of White, and it was claimed that this double discrimination was a denial of the equal protection of the laws by the taxing officials of Richmond County, and in violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. (P. R. p. 19).

3. That the Act of 1918, which it was claimed repealed by implication the General Tax Arbitration Act of 1910, and in pursuance of which the tax executions sought to be enjoined in this case were issued and sought to be levied, if it did, by implication, repeal said Tax Arbitration Act of 1910, it deprived White's estate and other taxpayers in the same class, of due process of law guaranteed by the "due process" clause of the Fourteenth Amendment to the Constitution of the United States, because under the Act of 1918, when the delinquent was notified by the Tax Receiver of the valuation, "the same was made final unless such delinquent raised the question that it was excessive, in which event the further procedure shall be by petition in equity in the Superior Court of the county where such property is assessed."

It was insisted in the Bill that this was not an adequate remedy to a taxpayer whose property had been assessed at an excessive amount. It was certainly not a legal remedy. It was not adequate because courts of equity have never been authorized, in Georgia, to levy and assess taxes, or to aid, in the levy and assessment of taxes, either the tax officials or the taxpayers, and on the contrary have been prohibited by statute from interfering with tax proceedings, all of which are statutory and must be literally complied with.

Under the limited power conferred upon the court of equity in this case, the taxpayer could only complain that the assessment was excessive, and the court could only enjoin.

These were the Federal questions which gave the United States Court jurisdiction.

Other questions were raised involving issues under the State law, which it is not necessary at this time to discuss.

EQUITABLE JURISDICTION

The complainant had no adequate remedy at law. The only remedy given to him under the Act of 1918 was to ap-

peal to a State court of equity, without clothing that court of equity with the power or machinery to assess the property in question for taxation.

It is doubtful whether the statutory right to appeal to a court of equity confers any right upon a litigant which he did not already possess under the general principles of equity jurisdiction.

It becomes a much more questionable right, when granted in a state where courts of equity, by statute, are prohibited from interfering with the levy and assessment of taxes, and where it is confined solely to the right of raising the question as to whether the levy is excessive.

But certainly a right to appeal, in a limited way, to a court of equity, is neither a legal nor adequate remedy at law. It is also certain that the Statute of the State, giving the right to appeal to a court of equity in the State, cannot oust the United States Court of Equity of jurisdiction if the other jurisdictional facts exist.

Without a remedy, the taxpayer's loss and damage would have been irreparable, because taxes paid in Georgia, under the Statute are held to be voluntary and cannot be recovered back.

When this Bill was presented to the United States District Judge Beverly D. Evans, he granted a temporary restraining order. Conceiving the prayer for interlocutory injunction to be one to be passed upon by three Judges, he called to his assistance U. S. Circuit Judge Alex. C. King and U. S. District Judge Samuel H. Sibley, and, after the hearing for interlocutory injunction, Judge Evans granted the restraining order and rendered the following opinion: (P. R. p. 82-83).

"Evans, Beverly D., Judge:

> The above stated cause came on for a hearing before Circuit Judge Alex. C. King, and District Judges Beverly D. Evans and Samuel H. Sibley, on an application for a preliminary injunction, and after hearing evi-

dence and argument, the Judges are of the opinion that the case as made by the pleadings does not fall within Section 266 of the Judicial Code, providing for interlocutory injunctions in certain cases; for the reason that no statute or order of any administrative board is attacked on the ground of unconstitutionality.

However, it appears that the assessment of the alleged omitted property belonging to the estate of J. B. White includes shares of stock of National Banks located in the State of New York. These items are not taxable in Georgia, and the collection of a State tax assessed against such shares will be enjoined.

The Act of July 31, 1918, for the collection of taxes due to the State, counties and municipalities and schools, by delinquents, which provides in Section 5, that the assessment of the Tax Receiver shall be final, unless the persons notified shall raise the question that it is excessive, when the further procedure shall be by pettion in equity in the Superior Court of the County where such property is assessed, impliedly repeals the remedy by arbitration given by prior legislative enactments in cases of delinquent taxpayers.

This Act of 1918 does not provide for a re-assessment in the event the valuation is found to be excessive by by the Court, because courts are without power to make an assessment of taxes; the same not being a judicial function.

It is charged in the bill that the property of this delinquent is the only property in Richmond County which has been assessed at its full market value, and in the aesssment of such property the tax officers are attempting to discriminate against this particular delinquent to his great pecuniary injury. In view of the evidence brought to support this charge, the present status should be preserved until a full and impartial inquiry can be had. Accordingly a temporary injunction is granted, to be effective until the case is disposed of on the merits.

This April 29th, 1922.

Beverly D. Evans,

U. S. Judge."

The case subsequently came on to be tried on its merits before U. S. District Judge Wm. H. Barrett, who rendered his decision on June 25th. 1923, (P. R. p. 190-199), in which he sustained the jurisdiction of the court, ruled against the contention of the Executor, complainant in the bill, that the decisions of the State Court were res adjudicata, and binding as to the award of the arbitrators; held that the Act of 1918 repealed the General Arbitration Act of 1910 and that the Act of 1918 afforded due process of law; overruled the objections of the defendants in the Bill to the evidence offered by the complainant in support of the contentions of the bill, and after quoting from the evidence, held on the issue of discrimination against White's estate in these tax assessments, as follows: (P. R. p. 198).

> "With this knowledge, the assessment against the White Estate at the true market value, was knowingly, willfully and intentionally administering the law so as to place upon one person a burden from which another person similarly situated, is relieved." And again: "But the evidence not only warrants, but practically demands the conclusion known of all men, that, if the estate be required to pay taxes on bonds and stocks of non-residents corporations, at their true market value, this estate will be discriminated against as compared with every other citizen of this county, in like situation, during the years for which taxes are sought, whether for current taxes or past taxes. Thus convinced, I am bound to grant protection against such discrimination."

The Court further held that under the evidence the amount of taxes for the years from 1911 to 1917, calculated and based upon the award of the arbitrators, which the executor had already paid to the Tax Collector pending the trial of the case, was a fair amount of taxes to be collected on said securities from said estate for the years in question. (P. R. p. 198-9).

However, the Court also held that the tender which the Executor had made to the Tax Collector on September 5th., 1919, in payment of the taxes calculated and based upon the award of the arbitrators, was not such a legal tender as to

relieve the estate from interest thereon, and in this decree required the Executor to pay the interest on the full amount which had been tendered, to-wit: $27,980.88 from September 2nd. 1919 to September 25th. 1922, the date on which said amount of $27,980.88 was again tendered to the Tax Collector and received by him, and with the exception of such interest the court decreed that the tax executions in this case should be cancelled, and their enforcement for any other amount than said interest, enjoined. (P. R. p. 199).

QUESTIONS RAISED ON APPEALS

The questions presented in the main or direct appeal by the tax officials, are practically all comprehended in the following questions:

1. Has the U. S. Court of Equity jurisdiction of this cause?

2. Did the Court commit error in overruling the objections to the evidence offered by the complainant in support of his bill?

3. Did the Court commit error in holding that the tax assessments on the securities in question against the White estate at the full market value, was an administration of the law knowingly, willfully and intentionally discriminating against the estate of White, and consequently violative of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

4. Did the court commit error in permanently restraining the enforcement of the tax executions issued upon said assessments over and above the amount of taxes already paid by the executor, namely: the amount of principal and interest calculated on the award of the arbitrators.

QUESTIONS PRESENTED BY CROSS-APPEAL

1. Did the court commit error in holding that the decisions of the State courts, both in the injunction proceedings brought to restrain the arbitration, and in the equitable pe-

tition brought to set aside the award of the arbitrators, were not res judicata, and that said decisions did not make the award as found by the arbitrators, conclusive and binding as to the proper and legal assessment of taxes against said securities? (P. R. p. 196).

2. Did the court commit error in holding that the Tax Act of 1918 repealed the universal Tax Arbitration Act of 1910? (P. R. p. 196).

3. Did the court commit error in holding that the Tax Act of 1918, if it repealed the General Tax Arbtration Act of 1910 afford to the taxpayer referred to in said Act of 1918, due process of law for the assessment of his property for taxation, since a court of equity in Georgia is not authorized to assess property for taxation? (P. R. p. 196).

4. Did the court commit error in assessing against the estate of White, interest on the $27,980.88, which included the principal and interest of all taxes calculated upon the award of the arbitrators up to September 5th. 1919, from September 5th. 1919 to September 25th. 1922? (P. R. p. 199).

LAW BRIEF AND ARGUMENT
JURISDICTION

Under the Jurisdictional Statute, Sec. 24, Chapter 1, under the title "Judiciary" of the Judicial Code, the essential requisites for jurisdiction of United States Courts, other than diverse citizenship, are as follows:

1. "The matter in controversy must exceed, exclusive of interest and cost, the sum or value of $3,000."

2. "The question presented must arise under the Constitution or laws of the United States."

The above two essential requisites apply both to suits at law, as well as to suits in equity in United States Courts.

The third essential requisite for jurisdiction of U. S. Courts of Equity, is set forth in Sec. 267 of the Judicial Code, under the head of "Judiciary," and is as follows:

> "Suits in equity shall not be sustained in any court in the United States, in any case where a plain, adequate and complete remedy may be had at law."

The amount in controversy in this case exceeds $180.000.

Three distinct Federal questions are bona fide raised by the bill and its amendments. The first of these, as stated above is the illegal attempt to levy and collect taxes in Richmond County, Georgia, on stock in national banks located in the City and State of New York, in violation of the express provisions of Revised Statutes Sec. 5219.

It has been repeatedly held that the questions arising under this section raises a federal question as to the validity of the tax, so as to give the Federal courts jurisdiction.

See the case of Sioux Falls National Bank vs. Swenson, 48 Fed. Rep. 621, and Stanley vs. Board of Supervisors of Albany County, 6 Fed. Rep. 561, where the headnote is as follows:

> "An action to enforce a right conferred by Sec. 5219 of the Revised Statutes regarding the taxation of property in the shares of national banking associations, is a suit arising under the laws of the United States."

In the case of Union National Bank of Cincinnati vs. Miller, Treas., 15 Fed. 703, it was held that a suit by a national bank against a county treasurer to enjoin the collection of an excessive tax upon its personal property, alleged to be made in violation of the Act of Congress permitting the State to tax national banks, presents a case arising under the laws of Congress, and is therefore maintainable in the Federal Court.

In Charleston National Bank vs. Melton, 171 Fed. Rep. 743, the 1st, headnote is as follows:

"1. A national bank, or stockholder therein, has the right to go into a Federal court of equity to test the validity under Revised Statutes, par. 5219, of a tax levied by State authority on the stock of the bank where there is no adequate remedy at law in such court, notwithstanding a remedy provided by the State Statute."

In the case of Peoples National Bank vs. Marye, 191 U. S. 272, the Court held that where the tax on national bank stock is partly illegal, the complainant must first demand a reduction and pay the legal portion, to be entitled to an injunction to restrain the collection of the tax.

In this case the entire assessment and tax executions issued thereon against the national bank stocks in New York, were illegal.

In the case of Covington First National Bank vs. Covington, 103 Fed. 523, the court held that where the entire tax is contested as having been imposed under a law which is invalid, because it conflicts with this section, a bill in equity will lie to restrain the collection of the entire tax.

As to this ground of jurisdiction, the appellants will probably claim that by a stipulation pending the trial of the case, (P. R. p. 239), they admitted the illegality of the assessment and the tax fi fas to that extent on the national bank stocks, and consented that the same should be enjoined. But even in their original answer to the bill, they did not admit it, nor consent to the reduction of this illegal part of the assessment and tax fas, and answered that for the want of information, they could neither admit nor deny the allegation. But it is insisted that had they made the direct admission in their answer, it would not deprive the Federal Court of jurisdiction, for that question is determined by the conditions as they exist and are presented by the bill at the time it is filed.

In the case of Fuller vs. Metropolitan Life Ins. Co., 37 Fed. Rep. 163, it was held that where the United States Court has jurisdiction, so far as the amount is concerned, when the

suit is filed, defendant cannot, by admissions, reduce the amount in controversy so as to defeat the jurisdiction of the court.

The same principle was announced in the case of Way vs. Clay, 140 Fed. Rep. 352.

In the case of Tennessee vs. Union & Planters Bank, 152 U. S. 454, in discussing the jurisdiction of United States courts, Mr. Justice Gray quotes the following language from 9th. Wheat. 738;

> "But the right of a plaintiff to sue cannot depend on the defense which the defendant may choose to set up. His right to sue is anterior to that defense, and must depend on the state of things when the action is brought. The question which the case involves, then, must determine its character, whether those questions be made in the cause or not."

See also to the same effect, Scheink vs. Moline Co., 147 U. S. 500, and Fair vs. Kohler Specialty Co., 228 U. S. 222.

STATE TAX DISCRIMINATION IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

The second jurisdictional question presented by the Bill was that the tax assessments in this case were willfully, knowingly systematically and intentionally discriminative against the estate of White, and therefore in violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. This question is fully and fairly raised and presented by the Bill, and shows by positive and distinctive allegations, not only the discrimination against the estate of White in favor of a large number, and all other estates, showing a similar situation, located in Richmond County, Georgia, which owned similar taxable securities which had not been returned for taxation during the years in question, and notwithstanding express notice and knowledge thereof to the tax officials and to counsel representing

the tax officials, who had deliberately not proceeded against the same for back taxes, but also setting forth gross discrimination against the estate of White as to the amount of the assessments. (P. R. p.18, 19, 75, 216). 218, 220

It seems unnecessary to cite any other authorities in support of this proposition, than the case of Taylor vs. Louisville & Nashville R. R. Co., reported in 88 Fed. 350, where the present Chief Justice, then presiding as a Circuit Judge for the Sixth Circuit, rendered the decision, in which he used the following language:

> "The sole and manifest purpose of the constitution was to secure uniformity and equality of burden upon all of the property in the State. As a means of doing so (conceding that defendant's construction is the correct one) it provided that the assessment should be according to its true value. It emphasized the object of the section by expressly providing that no species of property should be taxed higher than any other species. We have before us a case in which the complaining taxpayer and other taxpayers owning the same species of property are taxed at a higher rate than the owners of other species of property. This does not come about by legislative discrimination, but by the intentional and systematic disregard of the law by those charged with the duty of assessing all other species of property than that owned by complainant, and its fellows of the same class. The question presented, is, then, whether the sole object of an article of the Constitution is being flagrantly defeated to the gross pecuniary injury of a class of litigants, and one of them appeals to a court of equity for relief, it must be withheld because the only mode of granting it would involve an apparent departure from the method marked out by the Constitution and law for obtaining its sole object. We say 'apparent' departure from the constitutional method because that instrument contemplated a system in which all property should be assessed at its real value. The court is placed in a dilemma, from which it can only escape by taking a path which, while it involves a nominal departure from the letter of the law, does injury to no one, and secures that uniformity of tax burden which was the sole end of the constitution. To hold otherwise, is to

make the restrictions of the constitution instruments for defeating the very purposes which they were intended to subserve. It is to stick in the bark and to be blind to the substance of things. It is to sacrifice justice to its incident."

The above extract from Judge Taft's decision is quoted and adopted by the Supreme Court of the United States in the case of Green vs. Louisville & Interurban R. R. Co., 244 U. S. 517.

Other quotations from the last named decision by the Supreme Court of the United States will be given on the main discussion of the question of tax discrimination as presented by this case, but for the present, it would seem that the above authority is ample to show that the question of discrimination as presented by the bill in this case, is a real live question arising under the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

The third Federal question presented, was that, conceding that the Tax Act of 1918 repealed by implication the General Tax Arbitration Act of 1910, the same is unconstitutional, and in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States, in that by repealing the universal Tax Arbitration Act of 1910, it deprived the taxpayer in this case, and others of his class, of the right to arbitration of tax assessments universally granted to all other taxpayers of the State, and where the taxpayer complained that the assessment was excessive, his only remedy was to appeal to a State court of equity in the county where the property was located. (P. R. p. 84-53.a

If this question, want of due process, was clearly, fairly, and in good faith made by the bill, it would seem unnecessary to cite authorities to support the proposition that this question alone would have given the United States court jurisdiction.

EQUITY JURISDICTION

If the complainant in the bill had a plain, adequate and complete remedy at law under the Georgia Tax Statutes, then while the United States Court might have jurisdiction, it would have no equity jurisdiction.

In order to ascertain whether the taxpayer had a plain, adequate and complete remedy at law under the Georgia Tax Statutes, it would be necessary to comment, to some extent on these tax laws.

The entire method of levying, assessing and collecting taxes in Georgia under the Constitution of the State, is a function of the Legislature of the State, and is, and has been since the adoption of the Constitution of 1877, strictly statutory.

Some of the Statutes on the subject are as follows:
Civil Code (1910) Sec. 1163, is as follows:

> "No replevin shall lie, nor any judicial interference be had, in any levy or distress for taxes under the provisions of this Code. The party injured shall be left to his proper remedy in any court of law having jurisdiction thereof."

While in certain cases railroad companies are permitted to file illegalities against the enforcement of tax executions, that right has never been conferred by statute upon any other class of taxpayers in the State.

Taxes once paid in Georgia are treated as voluntary payments and cannot be recovered back.

Sec. 4317 of the Civil Code of Georgia (1910) is as follows:

> "Payments of taxes or other claims, made through ignorance of the law, or where the facts are all known, and there is no misplaced confidence and no artifice, deception or fraudulent practice used by the other party, are deemed voluntary and cannot be recovered back unless made under an urgent and immediate necessity therefor, or to release person or property from

detention, or to prevent an immediate seizure of person or property. Filing a protest at the time of payment does not change the rule."

These provisions of the law have been repeatedly enforced by the courts of the State.

In the case of Bohler vs. Verdery, 92 Ga. 718, the tax recever acting under the provisions of a local act for assessment of property for taxation, and believing the same constitutional, neglected to assess the property of the taxpayer when returned, and later, the local act having been declared unconstitutional, sought by an equitable petition to compel the taxpayer to agree to an assessment beyond the date permitted by the statute. The court, after quoting the section of the Code requiring the tax receiver to scrutinize carefully the returns, and, if he finds the property embraced in the return, or any portion of it, returned below its value, assess the same at once, or within thirty days, held as follows:

> "The courts cannot enlarge or extend the scope of the statute by granting further time, if the tax receiver fails to act within the time prescribed; nor can they, at his instance, require the taxpayer to submit to an assessment, by arbitration, under section 840 of the Code. Certainly the fact that the receiver believed, or relied upon the belief of others, that an invalid local statute was valid and superseded the law above referred to, so far as the particular county was concerned, that his failure to act was due to this cause could not give the court any power in the matter. The principles which authorize a court of equity to relieve against mistake, have no application to the case. The tax receiver is bound to know the law regulating his official duty, and for his error of judgment in reference thereto, no responsibility can attach to the taxpayer."

The above stated case has been repeatedly quoted by the Georgia courts in tax cases, approvingly, and has never been departed from.

While, in that case, the principle of strict statutory construction was applied against the tax officer in the case of

DuBignon vs. Brunswick, 106 Ga. 35, and where the same principle was applied against the taxpayer, the court, quoting approvingly from a Nebraska decision, uses this language:

> "A method prescribed by statute for enforcing and collecting the taxes, is exclusive; and if the statute embraces a right of action, the conditions and manner of the action as specified by the statute must be strictly observed, or the action will not lie."

Again in the case of Norris vs. Coley, 100 Ga. 552, the court held as follows:

> "But the summary remedy to which she (the State) resorts when, in the exercise of her sovereign power she thus seizes and sells a person's land, is in derogation of the established principles of the common law, and is, in great measure ex parte. Therefore, the statutes from which the power of our officers to seize and sell land can only be derived are to be strictly construed."

And on page 553 of the same case, quotes from Cooley on Taxation, as follows:

> "The officer who makes them, sells something he does not own and which he can have no authority to sell except as he is made the agent of the law for the purpose. But he is made such agent only by certain steps, which are to precede his action and which, under the law, are conditions of his authority. If these fail, the power is never created. If one of them fails, it is as fatal as if all failed. **Defects in the conditions to a statutory authority cannot be aided by the courts**; if they have not been observed, the courts cannot dispense with them and thus bring into existence a power which the statute only permits when the conditions have been fully complied with. Neither, as a general rule, can the courts aid the defective execution of a statutory power; they may do this when the power has been created by the owner, himself, and when such action would presumptively be in furtherance of his purpose in creating it; but a statutory power must be executed according to the statutory directions; and presumptively, any other exe-

cution is opposed to the legislative will, instead of in furtherance of it."

But perhaps the leading case in Georgia on the want of power in courts of equity to render aid in the collection or assessment of taxes, is that of the State vs. Western & Atlantic R. R. Co., 136 Ga. 619, where the court had before it an equitable petition brought by the State against the Western & Atlantic R. R. Co., to recover taxes designated in a lease contract. This decision was rendered by Mr. Justice Evans, at that time on the State Supreme Court Bench, subsequently the U. S. District Judge who rendered the decision granting the preliminary interlocutory injunction in this case.

On page 626, the decision is as follows:

"On the other hand, the weight of authority is to the point that when the statute undertakes to provide remedies, and those given do not embrace an action at law, a common law action for the recovery of the tax as a debt will not lie. Citing 1st. Cooley on Taxation, 17; and Burroughs on Taxation 254. It was a rule at common law that where a statute creates a right, and provides a particular remedy for its enforcement, the remedy is generally exclusive of all common law remedies. When this rule is considered in connection with the genius and spirit of our American institutions, its application to the collection of taxes, where adequate statutory remedy is provided, cannot be doubted. A most distinctive feature of the constitution of the United States, and of this State, is the division of the powers of government into three separate departments, executive, legislative and judicial. It was designed and intended that one department should not usurp the ordinary functions of the others, but that all three should act in harmonious relation. So, when the Legislature authorizes a tax for governmental purposes, and provides an adequate remedy for its collection by administrative officers, the necessary intendment is that the collection of the tax is exclusively confided to that administrative department of the government; and it has been held by this court that when the statute undertakes to provide remedies for the collection of taxes,

and those given do not embrace an action at law, a common law action for the recovery of taxes as a debt, will not lie." Citing DuBignon vs. Brunswick, 106 Ga. 317; State vs. Southwestern R. R., 70 Ga. 33.

The Court further recited that the contention that this was an equitable petition, made no difference; that whatever equitable relief was asked in the petition, was predicated upon the erroneous construction of the lease act; that the provision for the payment of taxes upon the income of the leased property was a debt arising from the contract executed pursuant to the Act, and not a tax.

The court then continued as follows:

"The General Assembly has enacted an elaborate scheme for the assessment of the property of railroad companies and the collection of any tax lawfully levied. Provision is also made for the collection of back taxes from delinquent or defaulting railroad companies, and whatever infirmity may have been in the original statute with reference to assessments without opportunity to the delinquent taxpayer to be heard, as pointed out by the Supreme Court of the United States in Central of Georgia R. R. Co. vs. Wright, 207 U. S. 127, has been relieved, and cured, by the amendment of 1908. The amendment relates to the remedy and does not impair any right of the taxpayer. It only supplied a defect in the existing law. The law as amended is applicable to the collection of back taxes without regard to the time of their accrual, if within the statute of limitations."

The court further held as follows:

"Another insuperable objection to this effort to collect a tax by civil action in the nature of an action of debt, is that there has been no assessment. An assessment is indispensable in proceedings to enforce the collection of taxes. Until an assessment of a per centum tax is made, the amount of the tax is not fixed. The tax proceedings are in invitum, and to be valid, the statute must be followed and no tax on property can be collected until it has been assessed. Citing Hawkins vs. Jonesboro, 63 Ga. 527. Should the Legislature pass

a tax law which inadvertently omits the mention of a return, but requires the payment of the tax to be made to a particular officer, it means, by necessary implication, that the return is to be made to the officer who makes the assessment of the tax. Citing Smith vs. Goldsmith, 63 Ga. 736. But as already indicated, the Legislature of this State has provided for an assessment by a particular officer, and the rule is well grounded and followed in this State that where the statute provides for an assessment by a ministerial officer, the assessment must be made by him, and not by the courts. Citing Bohler vs. Verdery, 92 Ga. 719 and Norris vs. Coley, 100 Ga. 553."

Again, in the very first case arising out of the tax proceedings in this case, namely: in the case of Richmond County vs. Steed, 150 Ga. on page 234, where the court held that the estate of White, the alleged delinquent taxpayer, could not be made a party defendant in the mandamus proceedings, so as to be bound by the assessment, the court used this language:

"Hence it would seem that the taxpayer is neither a necessary nor a proper party defendant to the proceeding. Furthermore, the statutory methods provided for the levy, assessment and collection of taxes, and particularly taxes of delinquents, are not merely cumulative they are exhaustive, State vs. Western & Atlantic R. R. Co., 136 Ga. 619. The right of mandamus against a taxpayer is not a remedy provided by statute for the collection of taxes. A departure from the settled doctrine will result in confusion. The settled policy of the State is that there shall be no judicial interference wth the collection of taxes, except, of course, as provided by statute. Our statutes permit the taxpayer to contest the taxability of his property by a suit in equity, and to have the valuation of his property fixed by a board of arbitrators. Citing the Universal Tax Arbitration Statute of 1910; Code Sec. 1116-d of Parks Annotated Code."

The attention of the Court is especially called to the fact that this decision was rendered on May 15th. 1920, nearly

two years after the Act of 1918 was passed, and in a case arising after the passage of that Act.

In the case of Georgia Railroad Co. vs. Wright, 124 Ga. 617, where two cases were before the Georgia Supreme Court, namely: that of the Georgia R. R. Co. vs. Wright and that of the Central of Georgia Ry. Co. vs. Wright, both involving the same question, namely: tax assessments upon certain stock owned by these corporations in an Alabama corporation, the Georgia Supreme Court used this language with reference to a tax defaulter:

> "When he fails to return in whole or in part, fraudulently or through an honest mistake, he then and there becomes a defaulter, and the door of opportunity is closed to him so far as his right to have the mutual rights between himself and the taxing power, adjusted by arbitration, is concerned. In other words, ample machinery is available to the citizen who makes full returns. Deprivation of the right to be further heard is one of the penalties visited upon the defaulter."

When the case came to the Supreme Court of the United States, reported in 207 U. S. 127, this court, after quoting from the decision of the Georgia Supreme Court as stated above, the last clause in that decision is as follows:

> "Reluctant as we are to interfere with the enforcement of the tax laws of the State, we are constrained to the conclusion that this system does not afford that due process of law which adjudges upon notice, and opportunity to be heard, which it was the intention of the Fourteenth Amendment to protect against impairment by State action."

Following this decision by the Supreme Court of the United States, the Georgia Legislature undertook in 1908 to remedy the defects by providing for arbitration of assessments in all cases of tax defaulters, and this legislation was perfected by the Universal Tax Arbitration Act of 1910, codified in Parks Annotated Code, Sec. 1116-d, which s as follows:

"Where the property subject to said tax is such as is returnable annually to the tax receiver of the county, that officer shall assess the same at the valuation fixed in the annual return, if satisfactory to him; if not, he shall, within thirty days after receiving said returns, make an assessment of said property from the best information he can procure, and notify in writing the person or officer making the returns, who shall have the privilege within twenty days after receiving such notice, to refer the question of the true value to arbitrators, one to be chosen by himself and one to be chosen by the tax receiver, with power to chose an umpire in case of disagreement, and their award shall be final, and said assessment when completed and entered upon the tax digest, shall be adopted and used by the county boards of education or other school authorities authorized by law to levy taxes for school purposes, in counties or school districts, in lieu of requiring separate returns or arbitrations for purposes of school taxes. Should the taxpayer desire to contest the taxability of said property under this section, he may do so by petition in equity in the Superior Court of the county where said property is assessed. Should the two arbitrators provided for in this section fail to agree upon the value of the property, and fail to name an umpire within twenty days after their appointment, the umpire shall be named by the ordinary or county board of commissioners, as the case may be."

It was under this section of the Code that the Tax Arbitration in this case was held which resulted in the award which was attacked.

Conceding for the sake of argument that the Act of 1918 repeals the above recited Tax Arbitration Statute, and that the only remedy of the taxpayer complaining that the arbitrary assessment of the tax receiver is excessive, is to apply to a court of equity in the county where the property is located, does the Act of 1918 afford a plain, adequate and complete remedy at law to the complaining taxpayer?

Naturally, this portion of the argument will not be confused with the question as to whether the Act of 1918 afford-

ed due process of law. It may have afforded due process of law, and not have afforded a plain, adequate and complete remedy at law.

Is the remedy one at law at all? Using the ordinary accepted meaning of words, is the bare right to go into a court of equity a remedy at law at all?

Following the strict constructions of the tax statutes in Georgia, as will be seen from the Georgia decisions quoted above, what relief could the complaining taxpayer, whose property had been excessively assessed, get from a court of equity in a state whose taxing system was purely statutory, where equity had been prohibited from interfering with tax assessments, and where courts of equity had never been empowered to assess taxes, nor aid in the assessment of taxes, nor aid in the defective execution of the statutes, and where the act itsef, giving the taxpayer the right to appeal to a court of equity did not empower the court of equity to assess the property for taxation, nor provide any machinery therefor.

Again, suppose the taxpayer in this case, instead of demanding arbitration, as provided by the Tax Arbitration Act of 1910, had failed to do so for twenty days after the notice of the assessment, and had appealed to the court of equity in Richmond County and the State courts had held that the taxpayer ought to have had his property assessed by arbitration, and the amount fixed, and tendered the same before he came into a court of equity, and having delayed to do so for twenty days as provided by the statute he had lost his rights. If we were to concede that this right to go into a state court of equity was a legal remedy, it certainly cannot be said that it is a plain, adequate and complete remedy.

But it has been repeatedly held by the Federal Courts that the right to go into a State court of equity would not deprive a litigant of the right to go into a United States Court of Equity.

In the case of Atchinson T. & S. F. Ry. Co. vs. Sullivan, 173 Fed. 456, by the 8th. Circuit Court of Appeals, the 2nd. headnote is as follows:

> "The adequate remedy at law which will deprive a court of equity of jurisdiction, must be as certain, complete, prompt and effiicient to attain the ends of justice as the remedy in equity, and in a case of this nature, the payment of the illegal portion of the tax and prosecution of an action at law to recover it back, is neither as prompt, certain, complete, nor efficient a remedy as a suit for an injunction against its collection."

In the case of Gammill Lumber Co. vs. Board of Supervisors of Rankin County, from the Dist. Court of Miss., reported in 274 Fed. 630 the 6th. headnote is as follows:

> "6. That on the hearing of an appeal from an assessment for taxes by a board of supervisors, the state courts will sit as courts of law and equity and grant full relief, both legal and equitable, cannot deprive a Federal court of equity of power to grant relief in a case properly falling within its equitable jurisdiction, as the blending in of a state statute of legal and equitable remedies will not affect the ancient equitable jurisdiction of the Federal Court."

Again in the case of Smythe vs. Ames, 169 U. S. 466, the 1st. paragraph of the syllabus is as follows:

> "The adequacy, or inadequacy, of a remedy at law for the protection of the rghts of one entitled, upon any ground, to invoke the powers of a Federal court, is not to be conclusively determined by the statutes of the particular State in which the suit may be brought. One who is entitled to sue in the Federal Circuit Court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that court, and he cannot be deprived of that right by reason of his being allowed to sue at law in a state court on the same cause of action."

In Singer Sewing Machine Co. vs. Benedict, Treasurer, 229 U. S. 481, in the syllabus it is stated as follows:

"The state courts cannot define the equity jurisdiction of the Federal courts; but where the State courts have held that a suit in equity could be maintained in courts of the State, the same suit can be maintained in the Federal court having jurisdiction in other respects."

In the case of Union Pacific R. R. Co. vs. Board of County Commissioners, 247 U. S. 282, the following extracts are taken from the syllabus of the court:

"Equity has jurisdiction to enjoin the collection of illegally discriminatory taxes where the existence of an adequate and complete remedy at law is doubtful."

"Where the legal remedy, by paying the taxes and suing to recover back, necessitates separate actions against several school districts and towns, it will not displace the equitable remedy by injunction in one suit."

It was held in this case that the legal remedy was so uncertain and debatable, that the jurisdiction in a suit for injunction could not properly be declined.

But it has already been seen from the quotation of the Georgia Statute, Civil Code Sec. 4317 quoted above, that taxes voluntarily paid in Georgia, cannot be recovered back, and this principle has been so repeatedly enforced by the courts that it is no longer an open question, and has ceased to be raised by litigants.

In the case of Wayne vs. Savannah, 56 Ga. 448 the 1st. headnote is as follows:

"As a matter of public policy, founded on the exigencies of government, municipal corporations must have present command of their current revenues. Property holders who have paid, whether voluntarily or by coercion, illegal taxes in former years, have no right to set off (by injunction or otherwise) such payments against executions issued for the taxes of later years."

Again, in the case of First National Bank of Americus vs. Mayor of Americus, 68 Ga. 121, the following occurs in the body of the decision:

"It is a well recognized rule that a tax, voluntarily paid, even though illegally assessed by the taxing power, where there is no misplaced confidence and no artifice, or deception, or fraudulent practice by the other party, cannot be recovered."

Again in the case of Hoke vs. City of Atlanta, 107 Ga. 416, the headnotes are as follows:

"1. A voluntary payment of an illegal assessment by a municipal corporation, upon a property owner for a street improvement, cannot, though made under protest, be recovered.

"2. When such an assessment is paid, merely to prevent a levy upon realty, it cannot be said that the payment was made under duress, and was therefore involuntary, the more especially when a complete and easily available legal remedy to prevent the levy was open to the landowner."

In the Singer Sewing Machine Company case, 229 U. S., cited above, it was stated in the body of the decision that in Colorado where the case arose, the taxpayer had the right by statute to sue and recover back the tax, and the court held that this right to recover back was one which could be enforced by an action at law, either in the U. S. courts, or in the State courts, provided the other elements of federal jurisdiction appeared. But it will be seen from the above case that in Georgia, a taxpayer not only has not this right by statute, but is expressly denied the right by statute and by the decisions of the courts. Therefore, if the taxpayer in this case had paid the amount of the grossly excessive and illegal tax executions, his damage and injury would have clearly been irreparable.

In the case of Shelton vs. Platt, 139 U. S. 591, cited by counsel on the other side, the headnote or syllabus is as follows:

"While an unconstitutional tax may confer no right, impose no duty, and support no obligation, the trespass resulting from proceedings to collect such void tax

cannot be restrained by injunction where irreparable injury or other ground for equitable interposition is not shown to exist."

And in the beginning of the decision, on page 594, by the late Chief Justice Fuller, the following appears:

> "It was ruled in Dows vs. Chicago, 11 Wall, 108-112 that a suit in equity will not lie to restrain the collection of a tax on the sole ground that the tax is illegal, but that there must exist in addition, special circumstances bringing the case under some recognized head of equty jurisdiction, such as that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury or where the property is real estate, throw a cloud upon the title of the complainant."

What could be more irreparable to the taxpayer than to have his property seized and sold under an illegal or grossly discriminating tax assessment, with no right to be heard, no plain, adequate and complete remedy at law to resist the tax, and no legal or equitable right to sue and recover back the illegal tax?

Great stress is laid in the argument of counsel for the tax officials in this case, upon the fact that at the time these tax executions sought to be enjoined, were issued, the executor had parted with all of the real estate belonging to White's estate, by transferring the same to the Trustees under the will, and that the only assets of which he was in possession were stocks and bonds and money in bank. Therefore, the executor could not go into a court of equity to enjoin the tax executions however illegal and unjust they might be, because the tax executions did not create a cloud upon the title to real estate. There are eminent authorities holding that it is the duty of the representative of the estate to protect the lands which he may have transferred under the will to the legatees from illegal tax levies.

They also argue strenuously that the bill does not allege that the situation would call for a multiplicity of suits. As a matter of fact, a multiplicity of suits, or even the right to

bring one suit to recover back the illegal tax in the case presented by the complainant's bill, would be generous provisions compared with the Georgia Statute holding that after he paid the illegal tax, or the property has been sold and the tax collected, he cannot bring suit of any kind to recover back the illegal tax. In other words, the ground of equity jurisdiction is the irreparable injury.

Suppose, for instance, that the estate had owned no other property except the securities which were held by Clews & Company for J. B. White in this case, and which are themselves the whole subject of taxaton in this litigation. Counsel for the taxing officials could, with just as great propriety, say that that would be a case, however great wrong or injury should be done to the taxpayer, where he could not bring a bill in equity to enjoin or restrain the illegal levy and sale of his property, merely because the taxpayer did not happen to own any real estate.

It is the irreparable injury which is the essence of the right to go into a court of equity, whether the illegal act sought to be restrained creates a cloud upon the title to real estate, produces a multplicity of suits, or arises in any other manner.

If learned counsel had taken the pains to read in full the decision of this Court in Shelton vs. Platt, 139 U. S., rendered by Mr. Chief Justice Fuller, he would have found abundant reason for the proposition that placing a cloud upon the title to real estate or causing a multiciplicity of suits, was by no means the only instance of irreparable injury. The court quotes from Mr. Justice Field as follows:

> "The equitable powers of the court can only be invoked by the presentation of a case of equitable cognizance. **There can be no such case, at least in the Federal courts, where there is a plain and adequate remedy at law."**

Clearly we would not be here if we had a plain and adequate remedy at law, but we have no remedy.

Again, in quoting from Judge Cooley on Taxation, on page 595, this language is used:

> "In ordinary cases a party must find his remedy in the courts of law, and it is not to be supposed he would fail to find one adequate to his proper relief."

But we have already shown that the Georgia Statutes have boxed up the taxpayer, and that they give him no remedy at law, provided the Act of 1918 repeals the Tax Arbitration Act of 1910.

Again quoting from Cooley on Taxation, the Court uses this language:

> "When a tax is assessed as a personal charge against the party taxed, or against his personal property, it is difficult to suggest any ground of equitable jurisdiction. **Presumptively the remedy at law is adequate.** If the tax is illegal and the party makes payment, he is entitled to recover back the amount.

As we have already seen, the presumption referred to by Judge Cooley is overcome by the facts in this case, and the positive statutes of the State of Georgia as construed by the courts of the State prohibit him from bringing his suit to recover back the illegal tax.

These same comments apply to all of the cases cited on this subject by counsel for the tax officials.

In the quotation from the Milwaukee case, in 116 U. S. 219 in counsel's brief, it is said that "it must appear that he has no adequate remedy by ordinary processes of the law," and again that "the threatened action would produce irreparable injury."

It may be that there would be no cloud cast upon the title to any of the real estate belonging to White's estate in this case because the executor has already assigned to the legatees and trustees under the will the real estate, but the executor is still in possession of a large number of stocks in corporations, some of which are in Georgia corporations, and

are of large value, which, under the Georgia statutes, can be levied upon and sold under either a common law execution or a tax fi fa in Georgia, as provided in Civil Code 1910, Sec. 6035, as follows:

> "Shares in a bank or other corporation may be levied on and sold either under attachment or fi fa in any county where the corporation does business,—notice of such levy being given to the defendant, if his residence be known, and also to the officers or agents of the corporation in the county where the levy is made. Upon demand by any sheriff, constable, or other levying officer of this State, having in his hands any execution or attachment against any person who is the owner of any shares of said bank or joint stock company, upon the president, superintendent, manager or other officer of any corporation or joint stock company, having access to the books thereof, said president, superintendent, manager or other officer aforesaid, shall disclose to said levying officer the number of shares and the par value thereof, owned by the defendant in said execution or attachment, and on refusal to do so, shall be considered in contempt of court, and punished accordingly."

The next secton provides how the stock shall be sold at public sale, and how the certificates representing the stock shall be legally transferred under the same.

FEDERAL QUESTIONS RAISED
UNITED STATES COURT HAS JURISDICTION TO DECIDE ALL QUESTIONS PRESENTED

In the case of Siler vs. Louisville & Nashville R. R. Co. 213 U. S. 175, the Supreme Court held:

> "Where the federal questions raised by the bill are not merely colorable but are raised in good faith and not in a fraudulent attempt to give jurisdiction to the Circuit Court, that court has jurisdiction and can decide the case on local or state questions only, and it will not lose its jurisdiction of the case by omitting to decide the federal questions, or deciding them adversely to the party claiming their benefit."

The court also held that the rule of that court was not to decide constitutional questions if the case could be decided without doing so, and when it could dispose of the case by construction of the State statutes, and on the lack of authority given by such statute to make the order complained of, it would do so rather than on the constitutional questions involved. The court also held that while the highest court of the State had not yet construed the statute involved in that case, that this court must, in the case over which it has jurisdiction, construe it.

The allegation was that the statute of Kentucky, in question, was a violation of the Federal Constitution and that this gave the Federal Court the right to decide all questions involved. Continuing, the court held as follows:

> "This court has the same right, and can, if it deem it proper, decide the local questions only, and omit to decide the Federal questions, or decide them adversely to the party claiming their benefit."

On page 193 the court used this language:

> "Where a case in this court can be decided without reference to questions arising under the Federal constitution, that course is usually pursued, and is not departed from without important reasons. In this case we think it much better to decide it with regard to the question of a local nature, involving the construction of the State statute and the authority therein given to the commission to make the order in question, rather than to unnecessarily decide the various constitutional questions appearing in the record."

Again in the case of Michigan Central R. R. Co. vs. Powers 201 U. S. 245, the court held as follows:

> "A State statute may be unconsttutional because conflicting with the Constitution of the State, or with that of the United States, but all objections to its validity, whether state or Federal, may be presented in a single suit and called for construction and determination; and as a Federal court has the jurisdiction, it may be its duty, when the question is properly presented, to pass

upon an alleged conflict between a state statute and the state constitution, even before the question has been considered by the state tribunals. It will, however, be reluctant to do so, especially where the suit is one affecting public revenues of the state."

Again in the case of Louisville & Nashville R. R. Co. vs. Garrett, 231 U. S. 303, the court held as follows:

> "Because of the Federal questions raised by the bill, the Circuit Court had jurisdiction and was authorized to determine all the questions in the case, local as well as Federal. A similar rule must be deemed to govern the application for preliminary injunction under the statute which requires a hearing before three judges, and authorities an appeal to this court."

We therefore respectively submit that the court not only had jurisdiction under the bill, but had the right to pass upon all questions properly presented by the bill, whether arising under the constitution of the United States and the Acts of Congress, or questions arising only under the State laws.

OBJECTIONS TO TESTIMONY OFFERED BY COMPLAINANT

The chief objections to the evidence, apparently that relied upon principally by counsel for the tax officials, is the testimony of C. A. Steed, the Tax Receiver, who made the assessments in this case. His testimony was originally given before the board of arbitrators on the 2nd. of September 1919, and is set forth in detail as an exhibit to the amendment filed by plantiffs in the equitable petition brought in the Superior Court of Richmond County to set aside the award of the arbitrators, the entire record of that case being attached as an exhibit to the amendment to complainant's bill in this case. (P. R. p. 153-157.

Steed testified that he had been tax receiver of Richmond County since 1908; that the securities of the White estate (the same now in controversy) were assessed for taxation in 1918 by the County Board of Tax Assessors at $250,000., of

which sum $200,000. was placed upon stocks and bonds, and $50,000. placed upon notes, mortgages and cash, and that for the same year the Jack estate was assessed upon stocks and bonds, $150,000., and that the aggregate returns of stocks and bonds for the entire balance of the county, amounted to only $132,000.; that in making the assessments in this case after including the National Bank stocks, being in a hurry, "we added somethng like $150,000. too much, or more than the valuations furnshed on the stocks and bonds in the Clews & Company assessments, which made a difference in the assessments of from $130,000. to $150,000. against the White estate.

"In making assessments for taxation, I have never undertaken to assess at the full market value. We had a rule not to assess at the full market value. No property in Richmond County is intended to be assessed at the full market value. The Board of Assessors never go over two-thirds valuation. On mortgages and other stocks, they take it at 50 cents on the dollar. The Board of Assessors has been in existence six years. I have never undertaken to assess any property at the full market value. When we made these assessments it was generally in accordance with their property value. Assessments on county property don't generally run up to more than 331-3%, as a general proposition, but they try to treat it on a 50% basis. But as a general proposition all that property is lower in assessment. I know of several other estates that have been administered in the court of ordinary in the last three or four years. I have not undertaken to assess any of these estates xcept the White estate for back taxes. It has not been brought to my attention. I begin to see I will have to get at them, but so far have not done so. We did have an estate, the Benson estate. We settled that at about 30 to 33% on the dollar. Hamilton Phinizy and Pierce Brothers represented the Benson estate in that settlement."

The objection offered to this testimony was that it made the officer give testimony which tended to impeach his as-

sessment against the White estate.

The objection offered is not sound, and is not supported by any of the authorities cited. The tax receiver was not asked a single question about the assessments against the securities of the White estate, except as to the difference between the amount of the assessments as made, and the amounts of alleged full market values as they appeared in the affidavits of McPherson and Dougald, which the receiver had furnished to the taxpayer as the basis of the information upon which he acted in making the assessments. His answer was that there was a difference of from $130,000. to $150,000. against the White estate. He was not even correct in this, as a comparison of the figures in the affidavits which counsel for the tax offiicials had already introduced before the Board of Arbitrators, with the amounts in the assessments as made, showed the excess assessment for 1913, after including the New York National Bank stocks, to be $212,395., and the excess for 1917 to be $53,006.83. These facts already appeared in the record, and the only information obtained from the officer was that the mistake occurred from the hurry in which the figures were put down. (P. R. p. 154).

The next fact inquired of and testified to by the receiver, was that the County Board of Tax Assessors, of which Board he was the clerk, or secretary, assessed these same securities of the White estate for the year 1918 for taxation, at $250,000.; $200,000. on stocks and bonds and $50,000. on mortgages, notes and cash. This fact also was a matter of record, and the tax receiver was the officer in charge of the record. It was a fact, and not a secret, nor privileged communication. It was done by an official tax assessing board of the County, of which the tax receiver was the clerk. It would be a strange doctrine of evidence which would make the tax receiver incompetent to testify to such fact. But this fact is otherwise in the record, in the written communication of the tax receiver as clerk of said county board of tax assessors, notifying the executor of White of said assessments on said securities for 1918.

The next fact stated by him was that the assessments and returns in Richmond County for 1918 on stocks and bonds, were as follows:

On the White estate	$200,000.
On the Jack estate	150,000.
For the entire balance of Richmond County	132,000.
Or an aggregate for the County of	$482,000.

These were also matters of public record in the tax receiver's official possession, and these facts so stated by him was not a case of repudiating records, but of substantiating them.

The next fact testified to by the receiver was that not since he had been tax receiver had he ever assessed for taxation any proprty at its full market value, nor had the County Board of Tax Assessors, during the past six years that it had been in existence, taxed any property at full mark value; that the rule of the Board was: on real estate, 66 2-3% of its value, and on mortgages and stocks, 50%, and on county property it did not exceed 33 1-3%. These were facts known to this officer. What rule of law prevented his stating them in a court of justice, where the public policy of the tax officials of the State and County, as to the rate of assessments upon various classes of property, was one of the main issues involved?

This testimony of the tax receiver, as stated above, was first given before the Board of Arbitrators, each of whom had taken an oath to do justice and equity between the parties. In that proceeding the tax receiver was one of the parties to the arbitration, and the executor of White was the other party. (This evidence of the tax receiver was used in the present case by consent of parties). How could the arbitrators do justice and equity between the parties in a tax arbitration proceeding without knowing what the prevailing

policy of the State and County tax assessing officers was as to various classes of property, and who better could state that rule or policy than the Tax Receiver, himself, one of the parties to the controversy, and himself an officer empowered to assess in certain cases, and the clerk of the only other official body in the county who made assessments, and their assessments making and constituting the public policy of assessments and establishing the rate for such assessments in the county?

Could a board of arbitrators have done equity and justice between the parties without knowing these facts? Did they not have the right to learn these facts from the tax official who was a pary to the arbitration?

The Tax Receiver was not asked as to his motives, intentions, purposes, or the operation of his mind in making the assessments against the White estate in this case, or as to the manner in which the assessments were made by him, as was done in the cases cited; to-wit: The Illinois Central R. R. vs. Kentucky, 218 U. S. 551; Chicago B. & Q. Ry. Co. vs. Babccok, 204 U. S. 585.

Had the Tax Receiver been asked whether the assessments in this case were in reality his official act, or merely entered and made by him at the dictation of the attorneys who are appearing for him, or if he had stated that he was acting under duress and compulsion of the Comptroller General of the State, and at the dictation of the attorneys who had brought the mandamus proceedings against him, and that the attorneys called out the figures and he, the Tax Receiver, placed them in the assessment, and that this, caused the patent errors in the figures, and the discrepancy between the assessments as made, and the affidavits as to values upon which they were based; and had he given this as the explanation, instead of the confusion of hurry, this would have been clearly illegal, as in such case the testimony of the officer would have impeached his official assessment and made the same void for fraud. But no such effort was made to elicit

such testimony and no such testimony was given. The testimony as given by the tax receiver was clearly admissible under the principle stated in the case of Louisville & Nashville R. R. Co. vs. Green, 244 U. S. 531 and 532, whch will be more fully referred to hereafter.

As practically all the objections to the other evidence offered by complainant go merely to the effect of its relevancy, materiality and weight, we will discuss these objections in connection with the two findings of the court in this case, namely: that the assessments, as made in this case by the Tax Receiver were willfully, knowingly and intentionally discriminating against the estate of White and that the taxes already paid, based upon the award of the arbitrators, is a reasonable tax on the securities in question, other than the additional interest assessed.

ASSESSMENTS WILLFULLY, KNOWINGLY AND INTENTIONALLY DISCRIMINATING AGAINST ESTATE OF WHITE

Among the evdence introduced before the arbitrators on September 2nd. 1919, is an affidavit of E. H. Callaway attached as an Exhibit to the amendment to the equitable petition brought by the State against the Executor, to set aside the award of said arbitrators,—a complete record of which case is attached as an exhibit to the amendment to the Bill in this case, pleading res judicata. (P. R. p. 152). The affidavit stated that deponent had examined the records of inventories of 66 estates of deceased residents of Richmond County, recorded from 1913 to 1918 inclusive, and that the aggregate amount of money solvent notes, stocks in non-resident corporations, and taxable bonds of said 66 estates aggregated $1,579,122., not including the estate of J. B. White. It also stated, separately, the amount of money, solvent notes and stocks in non-resident corporations and taxable bonds of 18 of said estates, aggregating $1,180,489., and that these inventories of said estates appeared in the office of the Ordinary of said County, the same place where it appeared from the

record in this case the attorneys for the tax officials obtained the original list of securities held by Clews & Co., for the White estate, which they used as the basis for the mandamus proceeding against Steed, Tax Receiver, and which they have used in all the subsequent litigation.

It will be recalled that Steed admitted in his evidence that he had heard, in a general way, of these estates, but had taken no steps to investigate them for back tax proceedings.

Again in the hearing for interlocutory injunction before the three U. S. Judges in Atlanta, Ga., another affidavit of E. H. Callaway, dated April 22nd. 1922, was introduced in evidence in the presence of the attorneys for the tax officials in this case, (P. R. p.238), stating in substance the same facts and figures as to the record and inventory of estates of deceased residents of Richmond County appearing on the records in said Ordinary's office of said County, and in addition stated that all of said decedents had been residents, citizens and taxpayers of Richmond County for a number of years prior to their deaths and that an examination of the Tax Digest of said County for the years 1910 to 1918 disclose that all of said 66 parties whose estates were so examined, did not return in any given year, in the aggregate as much as $2,000. of such taxable securities. The affidavit also stated that the facts as to the disclosure of such inventories had been called to the attention of the Tax Receiver of the County and of counsel representing the Sate and County, by the former affidavit read at the hearing before the Board of Arbitrators on September 2nd. 1919 and that notwithstanding said information, no proceedings had been instituted against any of said estates for the purpose of collecting back taxes on such securities by either the Tax Receiver or said attorneys.

Again at the hearing on the trial of this case on September 25th. 1922, the Executor introduced in evidence certified copies from the Court of Ordinary of Richmond County, of inventories of twelve estates of citizens and taxpayers of said

County who had died in said County during the years 1916, 1917 and 1918, showing the taxable securities owned by them at the time of their deaths; also certified copies of the tax returns as made by these same parties for five or six years prior to their deaths, showing that they had not returned any of said money, solvent notes or taxable bonds or stocks in non-resident corporations for any of the years for which the tax officers and their attorneys had been so strenuously endeavorng to collect back taxes upon the full assessmens against the estate of White, and yet the affidavit accompanying these certified copies, states that notwithstanding the previous notices to said tax officials and said attorneys, no efforts had been made to proceed against said estates for back taxes on said securities belonging to said estates. (R. R. p. 218, 221, 216).

The certified copies of inventories and returns so introduced were abstracted in the evidence as follows:

> There was introduced in evidence by Complainat, certified copies from the Ordinary of Richmond County, showing Inventories of the following estates; and also certified copies of the Tax Returns made by said decedents prior to their death, for the years from 1911 to 1917, inclusive.
>
> ESTATE OF MRS. JULIA C. LANGDON
>
> Certified copy of the Inventory of the estate of Mrs. Julia C. Langdon, filed May 19th. 1918, shows that she had in cash at the time of her death, ... $36,1957
> Taxable stocks in various non-resident corporations, of the appraised value of 61,8850
> Taxable bonds of various corporations 13,5500
>
> ---
>
> A certified copy of the tax returns made by Mrs. Julia C. Langdon for the years from 1911 to 1916 inclusive, shows that she returned no stocks or bonds for taxation for either of said years, and that her return of money, debits, notes, accounts, etc., did not exceed $10 for either of said years from 1911 to 1916 inclusive.

ESTATE OF D. B. PRINTUP

Certified copy of Inventory made 9th. of December 1916, showed a return of solvent notes owned by the estate at the time of his death, with various dates extending from 1910 to 1916 of the appraised sound value of $23,999.33
Money on deposit in various Banks at the time of his death 13,966.92

Certified copy of tax returns as made by D. B. Printup for the years 1914, 1915, 1916, and by the representative of his estate after his death for the year 1917, showing no money notes or credits returned by him for the years 1914, 1915 or 1916, but a return made by the representatives of his estate for the year 1917, after his death, of money notes, accounts and credits, of $18,000.

ESTATE OF MRS. LIZZIE M. FEAREY

Certified copy of the Inventory of the Estate of Mrs. Lizzie M. Fearey, dated 11th. day of October 1918, showing cash on deposit in Bank $4750.00

Also certified copy of tax returns of Mrs. Lizzie M. Fearey for the years from 1914 to 1917 inclusive, showing a return of no money, notes or creditors for either of said years.

ESTATE OF MADGE WILLIAMSON STEARNS

Certified copy of Inventory and appraisement of Madge Williamson Stearns, made the 31st. of May 1917, showing at the time of her death taxable stocks in non-resident corporations ..... $6,845.
Solvent notes ..... 3,800.

Also certified copy of tax returns of the Administrator of Madge Williamson Stearns' estate showing that she made no return of stocks, bonds or notes or credits for the years 1914, 1915 or 1916, and her administrator

after her death in 1917 made a return of stocks and bonds of $3500., and of money and debts of all kinds, $3,000.

ESTATE OF MRS MARY T. ACTION

Certified copy of Inventory of the Estate of Mrs. Mary T. Acton, dated 26th. day of November 1917, showing solvent notes representing loans on real estate and on stocks and bonds, of ..... $9325.
Cash ..... 700.

Also certified copy of tax returns of Mary T. Acton for the years 1914 to 1917 nclusive, showing no return of any money or credits, of any character, for either of the years from 1914 to 1917 inclusive.

ESTATE OF FREDERICK B. POPE

Crtified copy of Inventory of the Estate of Frederick B. Pope on the 13th. of December 1917, showing cash on hand, ... $14,004.34
Loans on real estate 35,680.00
Other solvent loans represented by notes 13,888.00

Certified copy of tax returns of Frederick B. Pope for years 1911 to 1916 inclusive, shows for each of said years the return of no money, notes, accounts or credits.

ESTATE OF CHARLES A. CRAWFORD

Certified copy of Inventory of the Estate of Chas. A. Crawford, dated 21st. of March 1918, shows solvent debts evidenced by notes $15,165.00
Cash on hand 6,207.14

Certified copy of tax returns of Chas. A. Crawford for years from 1914 to 1917 inclusive shows return of no money, notes, accounts or debts of any kind for the years 1914, 1915 or 1916 but shows a return of money, notes and credits for 1917 of $2350.

ESTATE OF LUCIE W. CASWELL

Certified copy of Inventory of the Estate of Lucie W. Caswell, dated 29th. of October 1917 shows solvent notes secured of $6500.00
Cash on hand 3524.71

Certified copy of tax return of Mrs. Lucie W. Caswell for years 1914 to 1917 inclusive, shows return of no money, notes, accounts or credits for either of the years 1914, 1915, 1916 or 1917.

ESTATE OF MRS. BRIDGET GALLAHER

Certified copy of Inventory of Estate of Mrs. Bridget Galaher, made the 6th. day of May 1915, shows cash on deposit in various banks, ... $10,328.
Solvent notes ..... 9,000.

Also certified copy of tax returns made by Mrs. Bridget Gallaher for years 1914, 1915 and 1916, shows the return of no money, notes, accounts or other credits for either of the years 1914, 1915 or 1916.

ESTATE OF ROBERT M. STILES

Certified copy of Inventory of the estate of Robert M. Stiles, made 17th. day of November 1917, showing solvent notes, ... $10,020.
(said notes bearing various dates for each of the years from March 3rd. 1911 to December 18th. 1915.)
Cash in Bank $3707.38

Also certified copy of tax return made by Robert M. Stiles for year 1914, 1915 and 1916 showing returns of money, debits, debts of all kinds, including notes, accounts, etc. for the year 1914, $350.; for the year 1915, $250.; for the year 1916, $300., and for the year 1917, $200.

ESTATE OF MOSES C. MURPHY

Certified copy of Inventory of the estate of Moses C. Murphy, dated 1st. day of May 1916, shrows various

and sundry solvent notes of the appraised value at the time of his death, of $122,451.76. The dates of all of said notes are set forth in detail upon the Inventory and Appraisement and show that all of said notes except four of them, hereinafter mentioned, are dated prior to Jan. 1st. 1911. The four exceptions are as follows:
One note for $7161.85 dated June 5th. 1913;
One note for $6300. dated June 11th. 1915;
One note for $200. dated Jan. 14, 1914.

In addition to this there appears notes due by the Board of Commissioners of Richmond County to the deceased, of the appraised value of $13,104.50, concerning which it might be claimed that these notes, being obligations of the County, were not taxable.

Also certified copy of tax returns made by Moses C. Murphy for the year 1911 to 1916 inclusive, from which it appears that the said Moses C. Murphy, during said years from 1911 to 1916 inclusive, made no returns for either of said years of any money, debts notes, accounts or choses in action.

ESTATE OF DOCTOR FRANKLIN JACK

Certfied copy of Inventory of the estate of Doctor Franklin Jack, dated the 6th. day of February 1918, showing ownership by the deceased at the time of his death, of taxable stocks in non-resident corporations, of the appraised value of $262,569.00
Taxable bonds of the appraised value of 61,050.00

Accompanying this return was an affidavit of the Ordinary, that an inspection of the tax digest of Richmond County in his office showed that said deceased during his lifetime had made no returns of any property of any character, nor any of said securities, nor any part thereof, for any of the years 1912, 1913, 1914, 1915, 1916, or 1917.

While these certified copies clearly showed all the information which the attorneys for the State and County had when they commenced their proceedings to collect back taxes out of the estate of White by mandamus proceedings against

the Tax Receiver, yet in response to their failure to institute any proceedings for back taxes against any of the above named estates, or any of the others whose inventories appear in the Ordinary's office, they contend that they could not tell from the inventories of these named decedents, whether such decedents owned any of these securities during any year preceding the year of their respective deaths. They had no more information than this as to the ownership of the securities disclosed by the inventory of the White estate, since the securities of the White estate actually stood, and had always stood, in the name of Henry Clews & Company of New York, and yet they actually went to New York and took the testimony of a member of the firm of Clews & Company as to such prior ownership, but have apparently refused to make any inquiry as to any previous ownership as to any of the other estates disclosed by the records in the office of the Ordinary of the County.

But this explanation does not answer the charge, and positive proof, of willful and intentional discrimination against the estate of White and in favor of all other estates of decedents who have died, and the inventories of whose estates appear of record in the Ordinary's office.

At least as to the estate of D. B. Printup, mentioned above the inventory disclosed that of the $23,999.33 of solvent notes owned by him at his death, some of them were dated as early as 1910, and all had various dates from 1910 to 1916, he having died in December 1916. (P. R. p. 218).

The situation is still more embarrassing as to the estate of Moses C. Murphy. There it will be seen the solvent notes as shown by the inventory of his estate, aggregated $122,451.76 and that over $107,000. of these solvent notes were dated prior to January 1st. 1911 and the remaining $15,000. being dated in 1913, 1914 and 1915. And yet the certified copy of his tax returns for the years 1911 to 1916 inclusive, show that he made no returns for taxation of any of said solvent notes, for any of said years. (P. R. p. 220-1). There

was positive proof of the prior ownership by a deceased person who had been a resident citizen and taxpayer of Richmond County from 1911 to 1916 inclusive, and it was not even necessary to go to New York, or elsewhere, to take testimony as to the prior ownership, nor even to make inquiry, the inventory itself (which the inventory of the White estate did not do) showed the prior ownership in detail for each of the years in question, and yet no effort was made to tax, notwithstanding the repeated notices, repeatedly given during the long pendency of this litigation, both to the tax receiver and to the attorneys representing the tax officials in this case. And the status is the same, so far as the large number of other estates showing ownership of similar securities as disclosed by the records or inventories in the office of the Ordinaary of said County, and among all of them the White estate is the only one proceeded against. If this is not willfully, knowingly and intentionally discriminating against the estate of White in the matter of instituting proceedings to collect back taxes, it would be impossible to make out such a case.

Attention is again called to the fact in the affidavit of E. H. Callaway, dated September 18th. 1922, (P. R. p. 216), that the evidence showed that while he personally examined the inventories of 66 estate, referred to in his previous affidavits, which were selected at random, showing some of the larger estates administered in said county, and some of the smaller estates, said records in the Ordinary's office for the years from 1915 to 1918 disclosed more than 100 estates where the decedents were residents of said County at the time of their death, and owned either money, notes and credits, or taxable stocks and bonds, or both, for the years from 1911 to 1917 inclusive, and that the records for the years from 1911 to 1917 inclusive, show the record of more than 200 estates where the decedents were residents of said county at the time of their death and owned either money, notes and credits, or taxable stocks and bonds, or both, and that in all of said instances the tax returns of said decedents, discloses

that they had made no returns of any money or credits, or taxable stocks or bonds for taxation, and in the few rare instances where any such property was returned, it was only in a nominal amount, and that the proportion of classes of property returned by said decedents in the 12 estates of which certified copies of the inventories thereof, and the tax returns of said decedents were introduced in evidence, discloses a fair average of all the tax returns made of said classes of property.

If this is not the administration of the law "by public authority, with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights" as was said by the U. S. Supreme Court in the case of Yck Wo vs. Hopkins, in 118 U. S. pages 373 and 374, it would be difficult to find such an instance.

But counsel representing the tax officials in this cause, without in any manner denying the facts, undertook to avoid the consequences thereof, first by introducing the affidavit of Steed, the Tax Receiver who made the assessments against the White estate, (P. R. p. 242), who stated that he had always tried to carry out the instructions of the Comptroller General with reference to assessing personal property, such as stocks and bonds in foreign corporations at their fair market vaue, so far as it had been within his power to do so, and that he had no personal knowledge of any such personal property, or the owners thereof, which had been withheld from taxation by any individual taxpayer, and that while he had seen a copy of the affidavit referring to the estates of the twelve parties, the inventories of whose estates and certified copies of their tax returns had been introduced in evidence, he had not been furnished with any information touching the character of such property, when the same was purchased or owned by said various parties, and that for all he knew, none of the property was owned by said parties on the taxable dates from the year 1911 to 1917 inclusive, and that he did not even act against the White estate until he was furnished with

such definite information, or until after the mandamus was instituted against him, and that he would do the same against any other estate, or owners, where he had furnished him such information, and under similar circumstances (referring evidently to the mandamus proceedings brought against him by Messrs. Pierce Brothers, attorneys for Richmond County, to compel him to tax said securities of the White estate). While this affidavit discloses that the Tax Receiver himself had, in the first instance, undertaken to treat the White estate in the same manner that he is now treating all of the other estates in Richmond County, and refused to assess until he was mandamused and furnished detailed information by Messrs. Pierce Brothers, the attorneys at that time for Richmond County, and now attorneys for the tax officials in this proceeding, he is not entirely accurate as to the information furnished by the certified copies of inventories of the estate of D. B. Printup and Moses C. Murphy, which disclose the definite ownership of definite property in each instance, further back than 1910. However, his affidavit furnishes most postive proof of the policy of the tax officials of the State, and particularly of Richmond County, with reference to such estates, and we must look somewhere else as to what officals were guilty of the willful, and intentional discrimination in proceeding alone against the estate of White, for the fact nevertheless exists, and the official act of the receiver in only making the assessments against the White estate, constitutes the discrimination.

The attorneys therefore introduced the affidavit of Benj. E. Pierce, (P. R. p244-5), member of the firm of Pierce Bros., representing the "taxing authorities since the beginning of the J. B. White tax litigation," and while denying any deliberate, intentional or willful discrimination against the estate of White, he said he had no information touching the estates referred to in the affidavit of said Callaway, except that as shown by said affidavit and the claimed summaries of the estates referred to in said affidavit; that he had no authority in tax matters generally; that his firm had been

given no "roving commission" to collect taxes generally, but was employed in specific litigations, to-wit: that involving the collection of back taxes upon the estate of J. B. White, and that involving litigation touching the collection of back taxes due by the Georgia Railroad & Banking Company.

In this connection it will be interesting to refer to the original contract between Pierce Brothers and the Board of Commissioners of Roads and Revenues of Richmond County, under which Messrs. Pierce Brothers originally appeared as attorneys for Richmond County in instituting this tax proceeding against the securities of the estate of J. B. White, and under which, so far as the County is concerned, the litigation is still continuing. The original contract is dated the 14th. day of October 1915, signed by the Chairman of said Board and by Pierce Brothers, and is attached as Exhibit "J" to an amendment filed to the equitable petition brought by the State of Georgia against the estate of White in the Superior Court of Richmond County to set aside the award of the arbitrators in this case, (P. R. p.159-161), a copy of which entire proceeding is attached as an exhibit to the amendment to the bill in this cause, pleading res judicata by the decision of the State court in said cause. After reciting that the Board was in possession of information which led them to believe that there was property in the County having status for the purpose of taxation in the county, and in order to determine the question of whether or not there was such property in Richmond County subject to taxation, it was necessary for the Board to employ counsel, and it had retained the law firm of Pierce Brothers for this purpose, the contract then recited as follows:

> "That in consideration of services rendered and to be rendered by said parties of the second part (Pierce Brothers) in enforcing the payment of taxes upon property which has not heretofore been returned for taxation or taxed, said Party of the First part, (Commissioners, etc.) hereby agrees to pay said parties of the Second part one-third of any gross amount which it

may recover as taxation of the property not heretofore taxed."

The next clause in the contract was as follows:

> "Partes of the Second part (Pierce Brothers) are to perform all services necessary for the purpose of carrying out this contract, and they are hereby authorized and empowered to institute such proceedings as they may deem necessary to enforce the payment of taxes upon property in said county, not heretofore taxed. If, in the event there should be no recovery in such proceedings, then the said parties of the second part are not to receive any remuneration for said services, with the understanding, however, that said parties of the First part agree to pay all traveling expenses incurred and all court costs which may have been incurred in the prosecution of said proceedings."

It will be seen that this contract was dated in October 1915, some 18 months before the death of J. B. White, but from the same exhibit it will be seen that on August 9th. 1917, it was so amended as to make the percentage compensation of Pierce Brothers 20 per cent of the taxes collected for the first three years after the right to tax is established. (P. R. p.160-161).

Again, as a part of the same exhibit, (P. R. p.161), it will be seen that on July 8th. 1918, after reciting that it had been brought to the attention of the Board that the Tax Receiver of Richmond County had not rquired the executor of the estate of White to make a return in pursuance of a notice given on June 4th. 1918, it was "Resolved, that the contract made with Pierce Brothers, of August, 1917, be, and the same is, hereby ratified and confimed, and they are directed to institute such legal proceedings, as are necessary to require an assessment for taxation of the property described in said notice of June 4th. 1918, a list of which property (the list taken from the inventory of White's esetate in the Ordinary's office) is hereto attached marked Exhibit "A" and made a part of this resolution. The fee to be paid said Pierce Brothers for services so rendered, is to be 20 per cent. of all back taxes which may be collected upon said property."

The language of the original contract under which said attorneys are still acting, subject to the subsequent modification as to the percentage of their fees, it would seem did give them a "roving commission" to collect back taxes, and they were employed to investigate and find out what property was subject to back taxes, and following that commission, they would have found on the recorded inventories of the same book and records in the Ordinary's office, the inventories of the other estates in said county, just as they found the inventory of the White estate, and they would have found from the tax digest of said county the same information which they found as to the White estate,—that said securities had not been returned for taxation during the years from 1911 to 1916 or 1917, inclusive, and with much less expense than traveling to New York to take testimony they could have learned whether said securities were owned by said other decedents than Whte during said years, and as to the Printup estate, they would have found part of the information as to previous ownership, and as to the Murphy estate, all of the information as to previous ownership, without taking any testimony anywhere, or making any inquiry. But the fact remains that no other demands were made upon the tax receiver to assess these estates for back taxes, or any other estate, except one small estate, the Benson estate, which appears to have been filed in the Ordinary's office on the 23rd. day of November 1916, (P. R. p.150-151), after the employment of Pierce Brothers by the Commissioners of Richmond County, in October 1916, but in that estate the proceeding for back taxes was instituted by the tax receiver, himself and Pierce Brothers, notwithstanding their contract with the Commissioners of Richmond County, appeared in the settlement of that back tax proceeding as counsel for the Benson estate, which the Tax Receiver, in his testimony, states was settled at from 30 to 33 cents on the dollar. (P. R p153-156).

We respectfully submit that this conduct of the attorneys for the tax officials, is very similar to the ostrich trick, who is said when danger approaches, sticks his comparatively small

head in the sand, but leaves his much larger body exposed high abovet the earth's surface.

But counsel for the tax officials, having undertaken to shift the burden on the County Commissioners who had employed them to hunt up property for back taxes, introduced the affidavit of M. C. B. Holley, (P. R. p. 244), who testified that he was the Chairman of the Board of Commissioners of Roads and Revenues of Richmond County which had employed Pierce Brothers, and that the information contained in the certified copies of the inventories of the twelve estates taken from the office of the Ordinary of said County, was the first that ever came to his attention, and he did not know whether the same was true or not, or whether the property in question, referred to in said inventories as owned by the various parties, were taxable debts of said years or not, or whether or not taxes had not been paid thereon for the years in question.

He further stated that none of the estates referred to represented anything like the amount of property owned by the estate of White, and that the information touching the White estate was that White was a multi-millionaire, worth some three million dollars, and that if such information was produced before the present Board, it would act in the same manner as it acted in said instance.

The Charman of the Board then undertook to protect the attorneys which he had employed, by stating that the County employed Pierce Brothers for the purpose of litgation in this case, and that they were not employed as any tax ferreters, and that they would have no authority, in the name of the County, to institute any suit for the enforcement of collecton of taxes unless employed for such specfic purpose.

As we have already seen, the orginal contract, practically giving the attorneys a roving commission to find out what property was subject to proceedings for back taxes, was dated in October 1915, and this affidavit by the Chairman of the Commission is signed in September 1922, and was

evidently signed without examining with care the language of the original contract with the attorneys and the only contract ever executed with them.

In fact it would appear from the above quoted resolution by the Board, of July 8th. 1918, specifically instructing the attorneys, Pierce Brothers, to proceed against the White Estate for back taxes, was called forth because the Tax Receiver had not proceeded to assess said White estate under a notice previously given on June 4th. 1918.

So that action apparently had been taken by Pierce Brothers under the prior contract before any resolution by the County Board naming the White estate specifically had ever been passed.

Attenton has already been called to the fact that the resolution of August 9th. 1917, referred to in the last named resolution was merely a modification of the percentage fee to be paid Pierce Bros. under the contract of October 14th. 1915, and did not otherwise change the same.

All that can be said for this affidavit of the Chairman of the Board of County Commissioners, is that he undertook to relieve from his attorneys the burden of the discrimination in this case, notwithstanding the contract originally made with said attorneys placed the responsibility of finding all unreturned property liable for back taxes and proceeding against the same, and his, or his Board's assumption of said responsibility, wherein he attempts to execuse the discrimination against the White estate by saying that it was a large estate and had some million and a half dollars worth of stocks and bonds in foreign corporations, thus indicating that it was the purpose, plan and intention of the Board to enforce the tax laws only against a large estate, and not against smaller estates.

It is respectively submitted that this is discrimination nevertheless, as the law makes no distinction whatever be-

tween between large or small estates for purposes of taxaton.

There appears in the evidence also affidavits of the Comptroller General, Wm. A. Wright, (P. R. p. 245), and State Tax Commissioner, H. J. Fullbright, (P. R. p. 246), but as these were in reply not only to the evidence of discrimination, which has already been discussed, but to the large volume of other evidence introduced showing the discrimination as to the amounts of tax assesssments against this class of securities and property throughout the State, we will discuss them after first discussing briefly that class of testimony offered by the complainant in the case.

FURTHER EVIDENCE OF DISCRIMINATION THROUGHOUT THE STATE

As the record in this case has not been printed, an accurate discussion of the further evidence introduced by the complainant in the bill in support of the charge of intentional discrimination cannot be very clear or full, nor can any reference thereto be made in this response to the motion in the various items of this evidence. For the purpose of resisting the various motions in this case, a general discussion and summary of this testimony will be made.

The reports of the Comptroller General for the years from 1911 to 1918 inclusive, (P. R. p. 211-212), were introduced in evidence. These reports showed for the years the returns of property by classes, not only in the State as a whole, but in each county of the State and the figures appearing in the evidence were taken literally from these reports for the respective years, both as to the State and as to the Counties referred to by the various county officials. These reports are published for the use of the Governor and the Legislature of the State, and for all other officials having anything whatever to do with the making of law, the assessments of property for taxation, or otherwise enforcing the collection of taxes in Georgia, and for the public generally.

In the Comptroller General's published report for 1912, on pages 13 and 14 thereof, under the heading "Revision of Tax System", after calling attention to the many defects in the taxing system of the State and inequalities which it brings about, continues as follows: (P. R. p. 211).

"INVISIBLE PERSONAL PROPERTY

Such as notes, mortgages, accounts, stocks, bonds and choses in action. It is a generally known fact that this class of property in this State represents a considerable part of the wealth of Georgia, yet it is equally true that but a very small part of it is ever returned for taxation. Some method should be adopted to reach this property and place it on the tax books and thus compel it to bear its just burden of the government. The State of Alabama has a statute providing for county tax commissioners to look up all omitted property from the tax rolls of their counties, their compensation for such being solely on the commission basis. I might add that the City of Atlanta has tried this method very satisfactorily for several years, and I would recommend that something of this kind be provided for the State. The present system of assessment is but little better than voluntary contributions of taxpayers to the State's revenue."

Notwithstanding this published statement by the chief taxing official of the State, the system as to stocks and bonds and largely as to money, and also, we might say, largely as to money and solvent debts, is still universally voluntary in the State of Georgia, except as to the estate of White, which has been so vigorously prosecuted in these tax proceedings to collect taxes on such securities at more than their fair market value, whereas under the evidence hereinafter referred to, the owners of similar properties in the State have not returned, or had such securities assessed at more, if as much as 5% of their market value, or, to be more accurate, have not returned such securities at all, and the General Assembly of Georgia has taken no steps, and passed no statutes designed to place said property on the tax books, and the tax

officials of the State have contented themselves with an occasional individual effort to collect taxes on this class of securities out of some one individual estate.

Immediately following the above published statement of the Comptroller General in the brief of evidence, (P. R. p. 212), appears a column showing the total aggregate value of returns and assessments for some of the classes of property for the entire State, for the years from 1911 to 1918 inclusive, from which it will appear that after the Comptroller General had published the statement above, the aggregate value of improved lands increased from $192,419,509. in 1911, to $244,574,762. in 1917; that the value of merchandise increased from $38,971,929. in 1911 to $44,246,871. in 1917; that money and solvent debts increased from $52,044.236. in 1911 to $53,722, 017. in 1917; and that stocks and bonds which is the chief class of securities of the White estate now sought to be taxed, were returned in 1911 at $2,934.050., and decreased so that the total aggregate returns of this class of property in 1917 was only $1,657,948.

Therefore, it is a reasonable conclusion from these figures, that notwithstanding the Comptroller General's published comment thereon, and admission of the fact in 1912, the situation grew much worse, and still this class of property is neither returned nor assessed in the State of Georgia, or, if returned and assessed, is at a mere nominal percentage of its value.

The published report of H. J. Fullbright, State Tax Commissioner for the year 1920, (P. R. p. 212-15), was offered in evidence, and from this was taken extracts showing that in his efforts to equalize tax values in the various counties and sections of the State "values had not been ordered reduced in any county, as being disproportionately high, for the very evident reason that they nowhere approached the legal requirement of 100%." Again: "The State Tax Commissioner did not think it wise to insist upon a strict compliance with the law that requires all property be returned at full

value. On the other hand, it was decided to adopt as a minimum basis for equalizing purposes, 35% of the then estimated true values.

Then appears printed columns, showing the estimated true value as of January 1st. 1920, (P. R. p212-15), and the per cent of said estimated true value represented by the tax digest, as finally approved by the State Tax Commissioner. These columns deal solely with real estate. The first column gives the name of the county; the next column gives the estimated true value of the real estate in said county, and the third column shows the per cent. of value as returned. The highest per cent. of value as returned of lands, appearing in the third column, is 60%, and the lowest is apparently 27%.

From the numerous affidavits of tax officials and other officials of the various counties of the State, hereafter appearing, it will be seen that these were the vaiues obtained by the State Tax Commissioner in his efforts to equalize tax values on lands, to get them up to an average of 35%, and these columns show the results after the increase.

The next evidence appearing in the brief of evidence and record in this case, was a certified copy of the assessment made by the Board of Tax Assessors of Richmond County for the year 1918, (P. R. p. 209), upon the same securities of White that are covered by the assessments in this case, and showed that said Board of Tax Assessors for Richmond County for the year 1918, assessed these same securities for taxation at $250,000., and according to the testimony of the Receiver, above referred to, $200,000. of this amount was placed upon stocks and bonds, and $50,000. upon mortgages, notes and cash.

These are the same securities which the Board of Tax Arbitrators assessed for the year 1917 at $360,813.92, (P. R. p. 132+209), and which is the award that the attorneys for the tax officials in this case have been litigating so diligently and continuously to set aside, and to have enforced the tax assess-

ment as made by the tax receiver in this case, at an amount of $1,623,567.52, and which latter assessment, and the execution issued thereon, the complainant in this bill is endeavoring to enjoin.

This Board of County Tax Assessors, is called in this brief of evidence, Board of Equalizers, but the official name under the Act, is the "County Board of Tax Assessors." The Board is provided for in what is known as the Tax Equalization Act adopted by the Legislature of Georgia in 1913. This Board was giving to the White estate the same treatment as every other taxpayer in the State was receiving in the assessment of his property for taxation and which, until the adoption of the Act of 1918, hereinbefore set forth, every tax defaulter received, and even under the law, assessments as made by this Board were subject to the right of the taxpayer, if dissatisfied therewith, to demand arbitration, and the arbitration, if demanded, was held under the universal tax arbitration statute of 1910, under which the securities of White were arbitrated between the Tax Receiver and the Executor of White's estate, as hereinbefore referred to.

But there were no employed attorneys on a percentage contract appearing for either the State or County Commissioners of Richmond County before the Board of Tax Assessors, when they made their assessments in this case, and that Board was unquestonably treating the estate of White like it treated all other taxpayers, whether tax defaulters or not, and there was really equal protection of the laws.

The report of John C. Hart, State Tax Commissioner for the year 1914, (P. R. p.), was introduced in evidence merely to show the inequalities existing under the taxing systems of the State, and containing the practical admission that none of the property paid full value as required by the Constitution.

Next was introduced a published address by H. J. Fullbright, State Tax Commssioner, dated January 1st. 1919, (P. R. p217-18), addressed to the County Tax Officials of

the State, and that he had adopted country real estate as the basis of computation, for the reason that it was only that class of property common to all counties, the quantity of which was shown on the tax books, and that he compared such value with the average return value of each county and found the per cent of its actual value as represented by the return value; that he assumed other property was returned upon about the same basis, and computed the real value of all property in the several counties in this way. He then continues as follows:

"The aggregate amount as shown by the tax digest of the counties when submitted to me for approval last summer, of all returned and assessed property in the State, is $982,623,-580. According to the computation made in the way pointed out above, this represents 32.6% of the actual value of the property thus returned for taxes, and a conservative valuation of the property on the tax books at the present time is a little more than three billion dollars."

Note that in all of this he is dealing only with country real estate.

The Tax Commssioner then went on to state that 96 counties fell below the State average of 32.6%, and that certainly no county below the average for the State, would hesitate to take the necessary steps to bring its value up to the average.

Appended to this report are tables of all the counties in the State, (P. R. p.212-15), the first of which shows the per acre average of improved lands as shown by the tax digest in the first column, and the second column shows the estimated per acre real value, which per acre average ran from $4.50 to $37.85 per acre, and the estimated real value ran from $7.50 to $100. per acre in some of the counties.

Table No. 2 in this published address showed the aggregate amount of the digest for each county for the year 1919, with the estimated vaue of the property of the county, and the per cent of real value shown by the return.

Table No. 3 showed the countes which should be increased in order to be equalized, etc.

While this published report of the State Tax Commissioner appears in the brief of evidence subsequently to the State Tax Commissioner's report for 1920, wherein he gave the results of his efforts to increase the taxes of country lands, it was really introduced first, and should have preceded, according to years, in its logical sequence. There was then introduced an affidavit of James P. Verdery, (P. R. p. 221), who had been a member of the Board of County Tax Assessors or Equalizers since 1914, and was one of the members of the Board who assessed the securities of the White estate for taxation in 1918, and who stated in his affidavit that from the best information he could obtain, the assessments so made, to-wit: $250,000., on said securities, were at a higher rate per cent of the full value, than the percentage of the returns of similar classes of property, as made by the taxpayers of Georgia, bore to the full market value for the year 1918, as well as for the years 1911 to 1917 inclusive, and that it was a fact well known not only to the people generally, but to the executives, tax officials of the State and to the members of he General Assembly, that said classes of securities were not generally returned for taxation by the owners thereof, and when returned, are returned generally at a mere nominal percentage of their full value.

There was a similar affidavit by H. K. Lowrey, (P. R. p. 222), another member of said Board of three Equalizers for said Richmond County for said year, and in similar language to that of said James P. Verdery.

There was then introduced an affidavit of (P. R. p222+3) H. R. DeJarnette of Putnam County, who testfiied that he was a member of the Special Tax Commission appointed by the Governor of the State under an Act of August 20th. 1918, and served as such until the Tax Commission made its report on June 1st. 1919. That he made considerable investigation into the values of various classes of property in Geor-

gia, and where possible to get statistics, either from the Census Department of the U. S. Government, or other sources, the same was used by the Tax Commission. That it was impossible to obtain any definite or accurate information as to the intangible property owned by the taxpayers of Georgia, as no statistics were available, but from the amount of money on deposit in the banks of the State, after making reasonable deductions and adding thereto what seemed to be, from inquiry, the reative ownership of solvent debts as compared with the ownership of actual money by the various classes of people of the State, the conclusion was reached that the actual return of money and solvent debts of the State disclosed by the Comptroller General's report for 1918, did not represent more than 10% of its fair market value, and that from inquiry, the relative ownership of solvent debts as comfronted with the lack of statistics showing aggregate amount of stocks and bonds owned by the taxpayers of Georgia, from inquiries made of brokers and others, he was of the opinion that the aggregate amount of such property returned in the State, as shown by the Comptroller General's report for 1918, did not represent more than 5% of the full aggregate value. That the same low percentage of rates of returns of full values of such property prevailed during the years from 1910 to 1918, inclusive. He then set out in his affidavit excerpts from the Comptroller General's reports from 1911 to 1918, showing the various amounts of money, solvent debts, stocks and bonds as appeared to have been returned during the years from 1911 to 18, and stated that from reliable statistics, there was on deposit in Georgia Banks in 1918 the sum of $380,000,000., and that for that year the Comptroller General's report showed returns of only $65,613,956. of both money and solvent debts, and that said conditions referred to as prevailing in the State were generally known by the people in the State, the executive and tax officials of the State, and the members of the General Assembly.

Then followed the affidavits of a large number of county officers, tax receivers, tax assessors and other county officials

from various counties of the State. These affidavits were made by the following parties: (P. R. p. 223 + 238).

J. G. Herrin, Chairman County Board of Tax Assessors from Morgan County;

A. H. Winter, Ordinary Morgan County;

A. C. Zachry, citizen and taxpayer of Morgan County;

P. N. Combs, Tax Receiver of Wilkes County;

F. B. Sims, Member Board of County Tax Assessors, Wilkes County;

Clement E. Sutton, Judge City Court Wilkes County, and County Attorney;

Frank E. Callaway, Clerk Superior Court and City Court of Wilkes County;

J. E. Camp, Member County Board of Commissioners, Floyd County;

Sam L. Graham, Clerk Superior Court, Floyd County;

J. Zack Salmon, Tax Receiver of Floyd County;

Idus E. Brewer, Clerk Superior Court Habersham County;

J. A. Robertson, Ordinary of Habersham County;

George T. Daniel, Attorney and Justice of the Peace, Habersham County;

W. S. Hubbard, Tax Collector, Coweta County;

G. E. Parks, Member Board Tax Assessors of Coweta County;

B. Paul Smith, Tax Receiver of Coweta County;

Edw. F. Lovell, Jr., Chairman Board Tax Assessors, City of Savannah;

A. B. Moore, Jr., Member County Board Tax Assessors, Chatham County;

W. D. Graham, Cerk Superior Court Chatham County;

J. Frank Carswell, Former City Tax Assessor of Personalty, City of Augusta, Ga.

Edw. B. Harrold, Chairman Board of County Tax Equalizers or Assessors for 6 years of Bibb County, now chairman City Tax Board, Macon, Ga.

W. K. Young, Asst. Tax Receiver Bibb County for 10 years;

Maurice Harris, City Tax Assessor, Macon, Ga.;

W. W. Hardaway, Clerk Superior Court, McDuffie County;

G. W. Lokey, Ordinary, and in charge of County affairs McDuffie County;

W. A. Watson, Tax Collector of McDuffie County;

A. M. Marshall, Tax Collector Putnam County;

C. D. Leonard, Jr., Chairman Board of Tax Assessors, Putnam County;

T. O. Walker, Clerk Superior Court, Putnam County;

H. D. Glanton, citizen and taxpayer Troupe County, Ga.;

T. J. Thornton, citizen and taxpayer Troupe County;

H. C. Battle, City Tax Assessor of LaGrange, Ga., for 18 years; ;;

John Lamkin, member County Board of Tax Assessors, Columbia County;

P. B. Mundy, Ordinary in charge of county affairs and Chairman Board of County Commissioners, Columbia County;

Jesse C. Palmer, Tax Collector Burke County;

G. W. Graham, Tax Receiver of Burke County;

Wm. H. Davis, Judge City Court of Waynesboro, Burke County;

E. E. Chance, Member of County Board of Tax Assessors, of Burke County;

W. M. Fulcher, Clerk Superior Court of Burke County;

The parties making these affidavits were practically all officials, and most of them tax officials in the various counties named. The counties included several of the largest cities in the State; others were medium sized counties, and some few of them small counties with small populations. The counties were distributed so as to represent practically every section of the State. Each affidavit copied from the Comptroller's General's reports for the years 1911 to 1917, the return value of several classes of property, most of them showing the per acre return of lands, all of them showing the total returns for ther respective counties for each year, of money and solvent debts, in one column, and the return of stocks and bonds in the last column. Some of them set forth merchandise as returned in their county for said years. In every instance each one swore that the returns of stocks and bonds in their counties for the respective years named, did not represent as much as 5% of the taxable stocks and bonds actually owned by the taxpayers of said county for said years. They all testified that due to the efforts of the State Tax Commissioner, aided by the Board of County Assessors, considerable increase was made in the return of farm lands, particularly from 1916 to 1918. Most of them testified that prior to said increase, the vaue of lands as returned did not represent more than 20% of the fair market value thereof; (P. R. p223+238. one or two testified that the average value of lands prior to the increase in 1917 and 1918 represented as much as 30% of the farm land value; all, except two, testified that the returns of money and solvent debts for their counties for the years named, did not represent more than 10% of the fair market value thereof. Some one or two fo them testified that they actually knew of some in-

dividual citizens in their county who owned more taxable stocks and bonds than were actually returned for the entire county, and one or more of them made a similar affidavit in reference to the return of money and solvent debts. All of them testified that these conditions as to the manner, and small percentage of returns of stocks and bonds, prevailed in all of the adjoining counties, and in every section of the State, and that said facts were well known to all the taxing officials of the State, and to the executive officers, and to the tax officials, and to members of the Legislature. So that it would seem that Richmond County was not the only County where stocks and bonds were not required to be returned, and that taxpayers owning the same were not proceeded against, as was done in this case against the estate of White, and where returns were made, they were at a mere nominal percentage of the market value thereof, and that this was known to the tax officials of the State, and acquiesced in, and that the condition prevailed throughout the State.

To meet this evidence, counsel for the tax officials in this case introduced the evidence of Wm. A. Wright, the Comptroller General of the State, (P. R. p. 245), in which he said that he had always tried to do his duty, and that he had never countenanced any of the tax receivers of the State allowing any taxpayer to return his property at any percentage of the value thereof, and had no personal knowledge that such had been done. Attention is called to the fact that he was the officer who, in 1912, made public in his 1912 annual report, the fact that money and notes and credits, and taxable stocks and bonds, were not returned.

We, therefore, respectfully suggest that he had official knowledge, if not personal knowledge.

Then follows the publication of the Comptroller General's instructions to Tax Receivers.

There was also an affidavit by H. J. Fullbright, the State Tax Commissioner, (P. R. p. 246), who, in his published reports, had said that there were 96 counties in the State

where the lands were returned for taxation at less than 32.6 per cent. of their value. In his affidavit he states what the law requires; that the tax officials did not know approximately the number of shares of stocks or bonds concealed, and not returned for taxation, nor the value thereof; that he was not aware of any uniform system and practice of the tax officials of the State allowing stocks and bonds, where they knew of their existence, to escape taxation. That there was no uniform, systematic discrimination practiced by the receivers in taxing one kind of property at one rate, and another kind at another rate, of which he had knowledge.

Counsel for respondents then introduced a number of stereotyped affidavits from a large number of tax receivers of the State to the effect that he had always sought to carry out the instructions of the Comptroller General of the State, and that he had no knowledge of any stocks and bonds in foreign corporations, held by residents of his county, that had not made the regular tax return on them, and that there was no uniform method in assessing property only at the fair market value as prescribed by law.

In addition to this, all of the evidence which was introduced before the arbitrators, was re-introduced on the trial of this case by the complainant, among others, the affidavit of Rufus Brown, Secretary of the Augusta Clearing House Association, (P. R. p127-148), stating that the amount of cash on deposit in the banks of Augusta on the 1st. of January 1915, was $8,296,607.; on January 1st. 1916, $10,135,480.; on January 1st. 1917, $12,827,533.; on January 1st. 1918, $17,632,542., and there were other affidavits of parties who had examined the records of mortgages in the clerk's office, (P. R. p148-149), indicating the existence of mortgage indebtedness not cancelled, of over $1,500,000. on Jan. 1st., 1912; over $2,000,000. on Jan. 1st. 1913, and over $2,500,000. on January 1st. 1914, and nearly $2,500,000. on January 1st. 1915.

The money in banks, after making proper deductions for

duplications and out-of-town holdings, when added to this record of mortgages and security deeds alone, which could not possibly represent all of the mortgages on the record, as no examination was made back of 1909 for the record, and no investigation was made later than January, 1915 and not counting the millions of dollars of unsecured notes not required to be recorded, it would appear that the tax returns of money and solvent debts for the years in question for Richmond County, aggregating less than $2,000,000. for the years 1911, 1912, 1913 and 1914, and practically $2,000,000. for 1915, and 1916, and less than $2,500,000. for 1917, did not exceed 10% of the money and solvent debts owned by the taxpayers of the County, as testified to in the affidavits of tax officials and other officials, not only of Richmond County, but various other counties of the State.

There is also the affidavit of John W. Dickey, (P. R. p. 145-147), a stock and bond broker of Augusta, Richmond County, Georgia, who testifies that from his knowledge of the purchase and sales of stocks and bonds by him to residents the people of said County own in excess of $4,000.000. of such securities, not including the estate of White nor the estate of D. F. Jack, and yet, excluding the assessments on those estates for 1918, the total returns and assessments on stocks and bonds for the balance of the county, was only $132,480. Dickey's affidavit erroneously stated the balance, $82,480.

It is respectively submitted that the evidence introduced by the complainant in the Bill, overwhelmingly sustained the charge of discrimination against the estate of White in making the assessments at more than the full market value, and that the affidavits introduced by the State Tax Officials and the County Tax Receivers, was nothing more than mere camouflage, and in no instance denied the actual facts charged, but relied upon the fact that they did not know, of their own personal knowledge, of the ownership of said taxable securities by the taxpayers. It is respectfully submitted that there are none so blind as those who will not see.

Not only the admissibility of the evidence offered by the complainant, was passed upon by the U. S. Supreme Court in the case of Louisville & Nashville R. R. Co. vs. Green, 244 U. S. 523, but the value of said evidence and its weight over the general presumption arising from the duty of assessors to assess at fair cash value, or by numerous stereotyped affidavits of tax receivers, alleging their obedience to the law, was announced in a syllabus by the court in said case on page 523, as follows:

> "Proof, comprising a body of official admissions in direct and circumstantial evidence, from unimpeached public and private sources and which fully sustained a finding that the great mass of property in Kentucky, embracing all tangible property except railroad property and distilled spirits, during a period of years, was systematically and notoriously assessed at not exceeding 60% of its fair cash value, held not overcome by general presumption arising from the duty of assessors to assess at the fair cash value, or by numerous stereotyped affidavits of former assessors, asseverating their obedience thereunto."

LAW BRIEF ON TAX DISCRIMINATION

We have already quoted the case of Green vs. Louisville & Interurban R. R. Co., 244 U. S. 500, and quoted therefrom at length, the decision rendered by the present Chief Justice when a member of the Circuit Court of Appeals for the 6th. Circuit in the case of Taylor vs. L. & N. R. R. Co., 88 Fed Rep. 350.

But the Green case is practically itself a brief on the subject of tax discrimination.

The court, after quoting from the Taylor case, as hereinbefore set forth, adopted the principle announced in the Taylor case by the present Chief Justice of this Court, and stated it in the following syllabus.

> "The principal, if not the sole reason, for adopting fair cash value as the standard for valuation, is as a con-

venient means of securing equal taxation, and since, when the standard is systematically departed from in respect to certain classes of property, its observance in respect of others, the tax rate being uniform, would serve to frustrate its very object, it follows that in such cases the duty to assess at full value, is not supreme but yields to the duty to avoid discrimination."

"Discrimination resulting from an assessment of the intangible property of a railroad corporation by the Board of Valuation and Assessment at 75% of its actual value, while the property of individuals and other classes of corporations taxed at the same rate, is generally and systematically assessed by other and independent taxing authorities of the State at not more than 60% of the actual value, is violative of the provision of the Kentucky Constitution requiring uniform taxation in proportion to value, and an identical rate as between corporate and individual property, and this has been recognized by the Supreme Court of the State."

"The courts of the United States, their jurisdiction being properly invoked, may afford relief against discriminatory state taxation, contravening the State Constitution when the discrimination results from divergent action of different assessing boards whose assessments are not subjct to any process of equalization established by the State, and where the diverse results are the outcome, not of express agreement, but of intentional, systematic and persistent undervaluation by one body of officials, presumably known to and ignored by the other body so that in effect the two bodies act in concert."

In the body of the decision, on page 507, the court quotes from the case of Reagan vs. Farmers Loan & Trust Co., 154 U. S. 362, where the decision was rendered by Mr. Justice Brewer, as follows:

"Neither will the constitutionality of the statute, if that be conceded, avail to oust the Federal Court of jurisdiction. A valid law may be wrongfully administered by officers of the state, and so as to make such administration an illegal burden and exaction upon the individual. A tax law, as it leaves the legislative hands,

may not be obnoxious to any challenge, and yet the officers charged with the administration of that valid tax law may so act under it in the matter of assessment or collection as to work an illegal trespass upon the property rights of the individual."

The court continuing, uses this language:

"In Raymond vs. Chicago Union Traction Co., 207 U. S. 20, the court upheld the right of action in a Federal Court to restrain the collection of taxes that have been assessed at a different rate, and by a different method from that employed with respect to other taxpayers of the same class, in defiance of the provisions of a constitutional statute that required equalization, and also in denial of the equal protection of the laws within the meaning of the Fourteenth Amendment."

The court, on page 514, also quoted from the case of Cummings vs. National Bank, 101 U. S. 153, as follows:

"When a rule or system of valuation is adopted by those whose duty it is to make the assessment, which is designed to operate unequally and to violate a fundamental principle of the State Constitution, and when this rule is applied not solely to one individual, but to a large class of individuals or corporations, equity may properly interfere to restrain the operation of this unconstitutional exercise of power."

At the bottom of page 515 the court uses this language:

"Taxing by a uniform rule requires uniformity not only in the rate of taxation, but also uniformity in the mode of assessment upon the taxable valuation. Uniformity in taxing implies equality in the burden of taxation, and this equality of burden cannot exist without uniformity in the mode of the assessment, as well as in the rate of taxation."

Again on page 518 of the same decision, the court further quotes from the decision of Judge Taft in the Taylor case, as follows:

"An intentional undervaluation of a large class of property when the law enjoins assessment at true value, is necessarily designed to operate unequally upon other

classes of property to be assessed by other taxing tribunals who, it may be presumed, will conform to the law

. . . . The various boards whose united action is by law intended to effect a uniform assessment on all classes or property are to be regarded as one tribunal, and the whole assessment on all classes of property, is to be regarded as one judgment. If any board, which is an essential part of the taxing system, intentionally, and therefore fraudulently, violates the law by uniformly undervauling certain classes of property, the assessment by other boards of other classes of property at the full value, though a literal compliance with the law, makes the whole assessment, considered as one judgment, a fraud upon the fully assessed property, and this is true although the particular board assessing the complainant's property, may have been wholly free from fault or fraud, or intentional discrimination."

The court then cites a large number of decisions from the State courts, who have recognized the justice of the view announced by Judge Taft above.

It cannot be said that the Georgia Courts have not recognized the justice of this rule, for in the very case of Georgia Railroad vs. Wright, 125 Ga. 602, being one of the cases reversed by the Supreme Court of the United States in 207 U. S., for failing to afford the taxpayer due process, the opinion rendered by Mr. Justice Cobb was as follows:

"The State law which, upon its face, so discriminates against a person or a class as to amount to a denial of the equal protection of the laws, is undoubtedly obnoxious to the provisions of the first section of the Fourteenth Amendment to the Constitution of the United States. But this provision of that amendment can be violated in other ways than by the passage of a State law. It has been held a number of times by the Supreme Court of the United States that a denial of the equal protection of the laws, within the meaning of this amendment, may arise out of the administration of a law which is perfectly fair upon its face. It has been held that the amendment is not only a limitation upon the legislative power of the State, but also upon the executive, and even the judicial authority of the State,

Though the law itself be fair on its face and impartial in appearance, yet if it is applied and administered by a public authority with an evil eye and an unequal hand so as practically to make unjust and illegal discriminations between the persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. Citing Yck Wo vs. Hopkins, 118 U. S. 373. A state acts by its legislative, its executive and its judicial authorities. It can act in no other way. The constitutional provision therefore, must mean that no agency of the State, or the officers or agents by whom its powers are executed, shall deny to any person within its jurisdiction, the equal protection of the laws. Whoever, by virtue of public position, under a state government, deprives another of property, life or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional prohibition, and as he acts in the name and for the state, and is clothed with the state's authority, his act is that of the State's. This must be, or the constitutional prohibition has no meaning."

It is pertinent to inquire here, who is acting in this case, first in instituting the proceedings to collect back taxes from the estate of White while leaving all of the other estates as disclosed by the inventories in the office of the Ordinary of Richmond County severely alone, though they own similar securities subject to taxation for the same period of time as White did, and in proceeding and insisting upon the assessments for the full market value, and actually making the assessments in excess of the full market value, whereas the Tax Receiver, himself, testifies that neither he nor the Board of County Tax Assessors have ever intentionally assessed any other property of any character in Richmond County, at its full market value for taxation.

It might be answered that the Tax Receiver was not responsible, because he at first refused and was mandamused by proceedings brought by the attorneys for the tax officials acting under a contract with the Board of County Commissioners. (P. R. p. 87-89).

Then the person who is acting in this case and pressing the collection of this tax at an assessment for full, or more than market, value, is the person who, in the language of Judge Cobb, of the Georgia Supreme Court above, is acting in the name of the State, and is clothed with the State's authority, and his act is that of the State.

It is conceded that returns and assessments of all classes of property in Georgia, are at a very low percentage of their true value. This has apparently been brought about by the universal legislative policy of the State of finally fixing the assessments of all property by arbitration both of public service corporations, and that class of taxpayers who are required to return their property to the Comptroller General, as well as that of private corporations and individuals required to make returns of their property to the tax receiver of the county. These low percentages are set forth in a report of the State Tax Commission, attached as Exhibit "H" (P. R. p157-159), to the amendment to the equitable petition brought in the State Court by the State to set aside the award of the arbitrators in this case, where the statistics, as given, disclose that in 1912 all property in the State was assessed at 36% of its value, and there was left unreturned, 64%, and in 1918 all property in Georgia was returned at 25% of its value, and there was left unreturned, 75%. There are other statistics taken from this report in said exhibit, that will be interesting. Some of the tax officials, and other county officials who gave affidavits as to the low percentage of returns of stocks and bonds in their counties in Georgia for the years in question, (P. R. p236-237, stated that where the tax assessors or the tax receivers had endeavored to increase the assessments on either real estate, personal tangible property, or intangible property, the taxpayers invariably demanded arbitration, and produced before the Board of Arbitrators the low prevailing rates in adjoining counties, and usually held down to low valuations the assessments as fixed by the awards.

Until the passage of the Act of 1918, all taxpayers of every character in the State had this right of arbitration, and only upon the passage of the Act of 1918, is it now contended that the right to arbitration has been taken away from the White estate and other taxpayers in its class,—at least to those who are required to return their property to the Tax Receivers, though the Act does not affect the right to arbitration by public service corporations and other taxpayers required to make returns to the Comptroller General.

There has been an arbitration of the securities of the White estate in this case; an arbitration regularly inaugurated by the Tax Receiver of the County in accordance with the universal Tax Arbitration Act of 1910. That arbitration proceeding has been held by the Supreme Court of Georgia to be a legal proceeding. The arbitrators have made their award, and their assessments are as follows: (P. R. p. 132)

For year 1911	$112,744.83
For year 1912	154,550.67
For year 1913	187,927.98
For year 1914	194,138.96
For year 1915	190,202.74
For year 1916	301,183.67
For year 1917	360,813.92

The amounts of the awards for the respective years are set forth in connection with what counsel for the tax officials in this case are insisting the awards should have been, on the last page of amendment which they offered to their equitable petition in the State Court to set aside the awards, (P. R. p. 141), and looking at these figures and comparing the two, it will be seen that the award for the year 1911 amounted to 12% of what they claimed; for 1912, 11 1-2%; for 1913, 15% for 1914, 13.8%; for 1915, 15%; for 1916, 21.5% and for 1917, 24%.

These results and assessments were reached by a Board of Tax Arbitrators just as all the other mass of property in

Georgia, real and personal, tangible and intangible, is now fixed and assessed for taxation, except the White Estate, and other taxpayers in its limited class, from whom all machinery for the assessmnt of the property for taxation has been taken away by the Act of 1918, if it repeals the Tax Arbitration Law of 1910.

However, pertinent authority on this question of discrimination, is the case of Atchison T. & S. F. R. R. Co. vs. Sullivan, 173 Fed. 456, by the 8th. Circuit Court of Appeals, where the 1st. headnote is as follows:

> "1. A systematic, intentional, continuing omission or undervaluation of other taxable property, in violation of the Constitution or Statute, by the taxing officers of state or county, pursuant to a rule of practice adopted by them, the inevitable effect of which is an unjust discrimination in taxation against the property of complainant and against other property similarly situated, will sustain a bill in equity in a national court to enjoin the collection of tax, based on illegal discrimination."

The 3rd. headnote is as follows:

> "3. The law presumes that every man intends the natural and inevitable effect of his deeds, and that taxing officers who intentionally omit or undervalue other taxable property in violation of the constitution or the statute, so that an undue share of the burden of taxation is necessarily thrown upon the property of complainant, intended to discriminate against its property. It is not necessary to its cause of action that the officers should have had any such actual intention, for their acts were as injurious and as remediable without as with, that intention."

In the case of Gammill Lumber Co. vs. Board of Supervisers of Rankin County, from the District Court of Mississippi, 274 Fed. 630 the 4th. and 5th. headnotes are as follows:

> "4. The assessment of the capital stock of a corporation at more than its market value, where other property in the county is customarily systematically and

intentionally assessed at not exceeding 6% of its fair market value, is a plain violation of the Constitution of Mississippi.

"5. An intentional discrimination in taxation is fraudulent, and it is within the jurisdiction of Federal Courts of Equity to grant relief against such fraud."

UNITED STATES AUTHORITIES CITED BY COUNSEL FOR TAX OFFICIALS

The case of Keokuk and Hamilton Bridge Company vs. Salm, et al., 258 U. S. 122, is cited to the effect that the U. S. Court of Equity had no jurisdiction in a case of this character.

The facts of the present case differ radically from that case. In the Keokuk Bridge Company case, the statutes of Illinois provided that every assessment made by the county assessors, was subject to revision by them. Also, moreover, upon complaint in writing that an assessment is incorrect, a board of review is required to give a hearing and correct the assessment as shall appear to be just.

Again it is provided that payment of taxes as finally assessed and extended against real estate is enforced in the first instance not by distress or levy, but by legal proceedings.

In the present case none of these remedies exist, or are provided by Georgia Statute, provided the Act of 1918 repeals the Tax Arbitration Act of 1910. Of course if it does not repeal the Arbitration Act of 1910, the arbitration already held in this case is binding, and the tax executions properly enjoined.

Again in the Keokuk Bridge Co. case, the amount of taxes admitted to be due was not paid.

In this case as soon as the arbitrators had rendered their award and the awards had been entered by the tax officers on the tax digest of the county, and the tax collector had figured the principal and interest of the taxes, the full amount there-

of was promptly tendered by the executor of White in payment of the taxes so assessed. In addition to this, the tender has been continuous, and as soon as the restraining order was dissolved, was again tendered, and finally, on September 25th. 1922, as soon as an intimation was given that the taxes would be received, they were actually paid.

In Georgia, under the Act of 1918, the taxpayer not only has no chance to be heard, except to appeal to a court of equity, and a court of equity not authorized to assess taxes, but which can only enjoin, and if he pays the taxes, he is prohibited by statute from recovering the same back.

In the case of McMillan vs. Anderson, 95 U. S. 42, it was at least presumed by the court in its opinion as rendered, that the taxpayer in Louisiana was not without legal remedies by the laws of the State, and if compelled to pay the tax by a levy upon his property, he could sue the proper party and recover back the money as paid under duress, if the tax was illegal.

In addition to this, there was express provisions regulating the proceedings for an injunction against an illegal tax.

In all of the other cases cited, the laws of the state provide some remedy and so far as we have been able to find, in every other state in the Union, except Georgia, the payment of an illegal tax may be recovered.

Again we have found in none of the cases cited, where the proof overwhelmingly established the proposition of knowingly, willful and intentional discrimination as appears here against the estate of White in proceeding against it for the collection of back taxes, and the deliberate refusal by the officers and attorneys in charge of this proceeding, to proceed against anyone of more than a hundred other estates in the county, owning the same class of securities, who have not returned the same, and where the attorneys and officials admit the facts, or at least do not deny the facts as established by certified copies from the records, and undertake to

avoid the consequences thereof by shifting the responsibility upon someone else. In fact the evidence as to the individual discrimination against the estate of White, so far as Richmond County is concerned, is conclusive, and we respectfully submit that the overwhelming evidence of state tax officials and other county tax officials throughout the State, as to the facts, show that the condition is not confined to Richmond County, but prevails throughout the State.

The only instance cited, from Savannah or Chatham County, (P. R. p. 242), where an amount of back taxes had been collected from some other estates from out of all the other counties in Georgia, proves the rule.

It is singular that the evidence as to those estates does not show what percentage of value the collection or settlement was made upon.

We therefore respectfully insist that the evidence demanded the finding of the court on facts, that the estate of White was knowingly, willfully and intentionally discriminated against in this case, and that the evidence also abundantly supported the finding of fact that the payment of taxes already made, based upon the award of the arbitrators, was the reasonable and fair share of the White estate's burden of taxation for the years in question.

BRIEF FOR APPELLANT ON CROSS-APPEAL

RES JUDICATA

The District Court, in the trial of this case, held that the former decisions of the State Court, first in the equitable proceedings brought to enjoin the arbitration, and next in the equitable petition brought to set aside the award as rendered by the arbitrators, though both cases were decided in favor of the executor of White, were not res judicata, and the executor in the cross-appeal assigned error upon this branch of the court's decision.

PROCEEDINGS TO ENJOIN ARBITRATION

There can be no doubt that the question as to whether the taxpayer in this case was legally entitled to an arbitration under the Act of 1910, was expressly raised in the original petition brought by the State in the State Court, seeking an injunction to enjoin the holding of the arbitration proceeding. (P. R. p. 86-92). The petition in this case appears as an exhibit to the amendment to the Bill pleading res judicata. In stating the reasons why the arbitration proceedings should be enjoined, paragraph 24 of said petition is as follows: (P. R. p. 90).

> "24. That no hearing has yet been had by said Board thus constituted, and petitioner contends that it can never hear nor decide the matter in question for the following, among other, reasons:" (then follows reasons numbered 1, 2 and 3, not here material.)

The 4th. reason assigned is as follows: (P. R. p. 91).

> "4. **That there is no authority of law to submit the right of said tax receiver to make said assessment, to said arbitration, and there is now nothing to arbitrate,** as over twenty days have elapsed from the day said Callaway, Executor, received notice of said assessment of July 28th., 1919, and he has not asked for an arbitration of the 'true value' of said property as authorized under said Act of 1910, nor has any board of arbitration been organized thereunder, and the executor is concluded by the assessment made by the Tax Receiver."

There were other grounds assigned, but they were upon specific points. The prayer was as follows: (P. R. p. 92)

> "That the court will, by its writ of injunction, enjoin and restrain defendants, and each of them, from proceeding to hear and determine the questions submitted to them under said arbitration proceedings, as set out in Exhibit "A" hereto attached, and will, by its decree, adjudge said arbitration proceedings void."

This petition for injunction was presented on the morning of September 2nd. 1919, the day on which the arbitrators had

fixed for the hearing of the arbitration between the taxpayer and the tax receiver of the county. There were no pleadings filed by the excutor to this petition for injunction, either demurrer, answer, or otherwise, but the Judge of the Superior Court of Richmond County refused to grant the injunction prayed for, (P. R. p. 93), thus permitting the arbitration to proceed, and the State sued out a bill of exceptions, as the same appears in the record, to the Supreme Court of Georgia, and the Supreme Court, in its decision rendered affirmed the judgment of the Superior Court of Richmond County refusing to enjoin the proceedings.

The case is reported in 150 Ga. Rep. 235, the material portion of the 1st. headnote being as follows: (P. R. p. 94).

> "The proceedings substantially complied with the law applicable to the case of a taxpayer who had failed to return his property for taxation, but had been notified by the tax receiver to make a return, who had failed to comply with the notice, and whose property had been assessed by the Tax Receiver, and who had accordingly demanded an arbitration."

This decision was first rendered on May 14th. 1920; a rehearing was asked for, and the decision was adhered to by the Court on August 14th. 1920, some two years after the passage of the Tax Act of 1918, and on a case first brought on September 2nd. 1919, more than a year after the passage of the Tax Act of 1918.

This decision was rendered by a Bench of six Judges.

It is difficult to conceive how this decision of the Supreme Court of Georgia is not conclusive in the case, which is between the same parties, of the right of the taxpayer to arbitration.

It is true that the plaintiff in that case did not plead the Act of 1918 as denying the right of the taxpayer to arbitration, but it was strenuously contended by counsel in a subsequent equitable petition brought to set aside the award of the arbitrators, and the position certainly acquiesced in by

Messrs. Hines and Fish, who base their opinion entirely upon the Act of 1918, that the Act of the Legislature did not have to be plead, but was involved in the case and considered by the court whether plead or not, and was before the court, and that the court must necessarily pass upon the same.

There are a number of sections of the Civil Code of Georgia (1910) announcing the conclusiveness of judgments rendered by courts of competent jurisdiction, on parties and their privies. The most pertinent one of these sections of the Code seems to be Sec. 4336, of the Code of Georgia, which is as follows:

> "A judgmnt of a court of competent jurisdiction is conclusive between the same parties and their privies, as to all matters put in issue, or which, under the rules of law, might have been put in issue in the cause wherein the judgment was rendered."

This principle has been applied by the Supreme Court of Georgia in numerous decisions. It is no exaggeration to say that there are more than a hundred such decisions applying the principles of the above recited section to litigants, but we will attempt to cite only a few of them.

One of these cases is that of Goldsmith, Comptroller, vs. Georgia Railroad Co., reported in 62 Ga. 542, and we quote from this decision because it was a case between a taxpaying corporation and the State of Georgia, represented by the Comptroller General, as showing that the doctrine of conclusiveness of judgments is just as binding upon the State as upon a private individual. This decision was rendered by Judge Bleckley, who subsequently was, for a number of years, the Chief Justice of the Georgia Supreme Court, and one of Georgia's most noted jurist. In the decision the court used this language:

> "We were much pressed, but little impressed, with the argument for the plaintiff, that the former adjudication simply ruled certain questions raised by the original demurrer to the affidavit of illegality, and that as the

proposed amendment sought to introduce new and distinct grounds of demurrer not before in the case, the case itself was left intact as to these grounds. This argument ignores the fact that there was a final judgment covering the entire case and disposing of it forever, which judgment was reviewed by this court and affirmed. The effect of a final judgment is not to be avoided by showing cause against it under the guise of an amendment to the pleadings. Amendments are admissible to uphold judgments, but not to overturn them. If the new grounds of demurrer were good ,or thought to be good, they should have been urged whilst the case was pending, and not held in reserve until some years after it was finally determined. That a change of incumbents in the office of attorney general had taken place in the meantime, makes no difference in the legal principle. The attorney general, like other counsel must abide the consequences of acts done, or omitted by, his predecessor. **Judgments, whether against the State or against individuals do not yield to a change of counsel or legal advisors.** The most eminent professional skill on earth cannot raise the dead to life by a motion to amend. This case was dead when the present attorney general was called to treat it, and his genius and learning can never reanimate its dry bones. He may well rest from his labors, so far as this case is concerned."

In the case of Perry vs. McLendon, 62 Ga. 598, a part of the headnote is as follows:

"The matter will be deemed res judicata as to all points which were necessarily involved in the general question of the legality or illegality of the arrest and detention, whether all of them were actually presented or not. It is sufficient if they might have been and ought to have been presented in the exercise of due diligence."

In Watkins vs. Lawton, 69 Ga. 671, the 1st. headnote is as follows:

"A judgment is conclusive as to all matters put in issue, or which, 'under the rules of law, might have been put in issue in a former suit against the same parties,

concerning the same subject matter in a court of competent jurisdiction."

It has ben repeatedly held by the Supreme Court of Georgia that the judgment of a trial court granting or refusing an injunction when it depends entirely upon a question of law, is upon its affirmance by the Supreme Court, a final adjudication of the question, and conclusive.

In the case of Atlanta vs. First Methodist Church, 83 Ga. 448, the Supreme Court held as follows:

> "Where, upon a bill brought by the trustees of a church for injunction against the enforcement of a city of an execution issued to collect an assessment for street improvement, a judgment denying the injunction was rendered, and thereupon a bill of exceptions to this court was taken by the complainants, on the hearing of which it was decided, as a question of law, that the city had no authority to enforce the execution, and that the injunction should have ben granted. This decision, covering the whole case, was a final adjudication, the effect of which was to require a decree perpetually enjoining the city from further proceeding with the execution."

In the case of Savannah Railway vs. Savannah, 115 Ga. 137, the Supreme Court of Georgia held that a judgment denying an interlocutory injunction when the same depends entirely upon questions of law, is, upon its affirmance by the Supreme Court, conclusive against the paintiff in error as to every question made by his assignments of error, though there be no express reference to all of them, either in the opinion filed or in the synopsis of the points decided.

In Ingram vs. Trustees of Mercer University, 102 Ga. 226, the headnote is as follows:

> "1. Under the decision of this court in the case of City of Atlanta vs. First Methodist Church, 83 Ga. 448, a judgment of a trial court granting or refusing an injunction when the same depends entirely upon a question of law, is, upon its affirmance by the Supreme Court, a final adjudication of such question.

In Murphy vs. Harker, 115 Ga. at the bottom of page 91 and top of page 92, the court held as follows:

> "If the judgmnt granting an injunction is based upon the decision of a question of law determining that the plaintiff has, under the facts, proved such an interest or such a title in the property as to authorize the issuing of the writ, and that judgment is affirmed by this court, then if at the final hearing the same facts appear as appeared at the interlocutory hearing, and no other, the judgment of the judge on the question of title concludes the parties." Citing the two above cited cases.

In the case of Bailey vs. Ross, 71 Ga. 773, it recites that the same case was before the Supreme Court on the application for injunction, reported in 68 Ga. 735, and that on demurrr the b ll was dismissed on the ground that there was no equity in it, and that it set up a stale demand which was barred by the Statute of Limitations.

The court then proceeded to hold that the former decision had decided the legal questions presented.

How can it be said that in this injunction case, both before the judge of the Superior Court and before the Supreme Court of Georgia reviewing the same on proper bill of exceptions, there was any question involved except purely a question of law? The case was presented to the Judge of the Superior Court and to the Supreme Court on the plaintiff's petition, with no answer filed, no demurrer filed and no issue raised as to any question of fact or law presented in the petition. Both the Superior Court, as well as the Supreme Court necessarily had to pass solely upon the law of the case, based upon the undisputed facts as stated.

Again the court in the case of McLendon vs. Shewmate, 128 Ga. 526, held that a judgment in a claim case, was conclusive between parties as to all matters put in issue, or which, under the rules of law, might have been put in issue in the trial of the case.

Again in the case of Atlanta Ry. Co. vs. Brown, 129 Ga. 662, it was held that where the law applicable to the controlling issues in the case, as announced by the Supreme Court when the case is before that court on appeal, it constitutes the law of the case on another trial where the issues are the same.

In the case of Latimer vs. Irish-American Bank, 119 Ga. 887, it was held that a judgment of a court of competent jurisdiction was conclusive between the same parties, and their privies, as to all matters put in issue or which under the rules of law might have been put in issue in the case wherein the judgment was rendered. This same principle was announced and applied by the Supreme Court of Georgia to previous trials in the Federal Courts, in the case of Georgia Railroad & Banking Co. vs. Wright, 124 Ga. 596, where it was held that the Georgia Railroad was estopped to set up any matter which was, or might have been, plead by it in its own interest in the trial of the same cause in the Federal Court

But this is not the only extent to which the Supreme Court of Georgia has held parties bound by a previous decision. It has been repeatedly held that even though the principles announced in the decision may be subsequently reversed in other cases between different parties, it cannot be modified, changed or reversed by the Supreme Court in the same case, and between the same parties.

In the case of Georgia Penitentiary vs. Nelms, 65 Ga. 499, in the body of the decision, the court used this language:

> "To review and reverse a decision is a very different thing from reviewing and reversing a judgment that has been rendered when the case and parties are the same."

The court then quotes from the case of Russell vs. Slaton, 38 Ga. 195, as follows:

"The judgment of the Supreme Court in a case is a judgment affirming or reversing the court below, and is final and conclusive between the parties on the matters involved in that trial. The opinion of the court on the law of the case does not stand on the same footing, and may be overruled after argument, if shown to be erroneous, even if unanimous. The judgment of affirmance or reversal by this court of the judgment of the court below, is not the subject of review. This is a court of last resort ,and it would be extraordinary law indeed that would justify such a review."

In the case of Southwestern R. R. vs. Wright, Comptroller General, 68 Ga. 312, the 7th. headnote is as follows:

"A decision made in a particular case, must control the case. The principle might be reviewed in another case and reversed."

In Allen vs. Schweigert, 113 Ga. 69, the case was carried to the Supreme Court, where the decision of the lower court was reversed, the Supreme Court holding that the petition set out a good cause of action. When the case appeared the second time in the Supreme Court, request was made to review and overrule the decision made in the case when it was before the court the first time, and they held as follows: "We are clear that this could not be done, even if we were of the opinion that the former decision was unsound. When a judgment is rendered in this court, it is binding, whether it be right right or wrong, upon the parties, as the law of the particular case. If, upon a hearing of the case, or upon another trial, the same questions are raised, the first decision must control upon these questions. As to that case they are res judicata."

In the case of Bank of Commerce vs. New York Ins. Co., 131 Ga. 312, the 1st. headnote is as follows:

"This case was before the Supreme Court on a former writ of error. The rulings then made are binding and are conclusive unless, on the second trial, the facts were sub-

stantially different from those on the first trial. The decision then made is not subject to review or reversal in the same case.

In Western & Atlantic R. R. Co. vs. Third National Bank of Atlanta, 125 Ga. 489, the 1st. headnote is as follows:

> "A decision by the Supreme Court is controlling upon the Judge of the trial court, as well as upon the Supreme court when the case reaches that court a second time. The principle in the decision may be reviewed and overruled in another case between different parties, but as between the parties, the decision stands as the law of the case, even though the ruling has been disapproved by the Supreme Court in a case decided before the second appearance of the case in that court."

In the case of Rawlins vs. State, 126 Ga. 96, the 1st. headnote is as follows:

> "The ruling made by this court when the cases of the present movants were before it on exceptions to the overruling of former motions for new trial, are binding and conclusive adjudications, and the motion to review the decision then made cannot be entertained."

In Atkinson vs. Battle, 11 Ga. App., 837, the 1st. headnote is as follows:

> "A judgment of the Court of Appeals reversing a judgment of the trial court sustaining a demurrer to a plea upon the ground that no defense is therein set forth, cannot be set aside on motion in the trial court on the call of the case for trial, upon the ground that since the rendition of the decision in the Court of Appeals, the Supreme Court in another case announced a rule of law contrary to the decision of the Court of Appeals."

In the case of Stansell vs. Columbia National Life Ins. Co., 27th. Ga. App. 538, the 2nd. headnote is as follows:

> "Under the doctrine known as the 'law of the case' the court did not err in striking certain portions of the

original plea and certain amendments thereto, since, according to the rulings made by this court (in the case formerly) the law as to such a defense, so far as this case is concerned, has been fixed and determined by express rulings adverse to defendants and by them not only the lower court but this court as well, is bound."

It is therefore respectfully submitted that when the Supreme Court of Georgia, in the injunction proceedings, by a unanimous decision of the court, held as a matter of law under the undisputed facts as stated, that the taxpayer, the estate of White, was entitled to an arbitration, and that the board of arbitrators, as then organized, was legally competent, under the law, to arbitrate the assessment of taxes in this case under the statutory law of the State, and whether this decision was right or wrong, it continued to be the law of this case, and is controlling in all subsequent litigation, and that even the Supreme Court of Georgia, by a unanimous decision, could not have reversed the same in a subsequent equitable petition brought to set aside the award of the arbitrators, it being conceded, however, that if the arbirtation as made was void for fraud, accident or mistake, the questions raised by the subsequent equitable petition to set aside the award, the Supreme Court could, by a majority opinion of the entire court, have set aside the award.

JUDGMENT OF STATE COURTS ON EQUITABLE PETITION TO SET ASIDE AWARD, RES JUDICATA

After the arbitration had been held and the award rendered, counsel representing the State officials brought an equitable petition in the name of the State against the Executor, the Tax Receiver, and the Tax Collector and the Arbitrators to set aside the award. (P. R. p.97-103). They attached as an exhibit thereto, the previous petition for an injunction against the holding of the arbitration, making the same a part thereof. (P. R. p.103-110). After setting out the amount of the assessments for each of the years in ques-

tion, as found by the award of the arbitrators, it attacked the same as illegal, and alleged that the amounts as fixed by the assessments were so small in amount as to amount to a legal fraud. The petition only set out a part of the evidence, and imperfect briefs of most of the evidence introduced before the arbitrators. (P. R. p. 110-130). It was designed as a supplementary petition to the original petition, which was attached thereto as an exhibit brought to enjoin the arbitration proceedings. (P. R. p. 102-3), and prayed, (P. R. p. 102-3), that the assessment made by the arbitrators be set aside and decreed null and void, and that Steed, the tax receiver, be enjoined from placing the assessment made by the arbitrators upon the digest of the county, and that Bohler, as Tax Collector, be restrained from collecting any taxes upon the assessments as made by the arbitrators. Upon the presentation of this petition to the Judge of the Superior Court of Richmond County on September 6th. 1919, he issued a rule nisi against the defendants, Steed the Tax Receiver, and Bohler, the Tax Collector, to show cause why they should not be enjoined, and restrained them from changing the status in the meanwhile. (P. R. p. 130). The defendant executor demurred to this petition, (P. R. p. 162-5), first on the ground that the petition set forth no legal or equitable cause of action. The 2nd. and 3rd. grounds of the demurrer was that the proceedings ought to have been brought in the name of Steed, the Tax Receiver, instead of in the name of the State of Georgia, since he was the tax officer on the other side of the arbitration to the executor of White, and in said arbitration proceedings under the statute represented the State and other taxing authorities." The 4th. ground was "because the petition did not set forth the evidence before the arbitrators." This defect was met by an amendment setting forth the evidence. (P. R. p. 136-161). The 5th. ground was "because no copy of the arbitration proceedings were set forth." This defect was met by an amendment. (P. R. p. 152). The 6th. ground was "because it did not appear from the pe-

tition that the award of the arbitrators which was attacked and sought to be set aside, was the result of either fraud, accident or mistake." This went to the merits of the cause and could well be said to have been included in the first ground that the petition set forth no legal or equitable cause of action. The 7th. ground was that the "plaintiffs therein, through counsel, appeared before the court of arbitration and participated therein." This, in like manner, was in support of the validity of the arbitration and on the merits of the case. The 9th. ground was as to the allegations about the oath administered by Steed, the Tax Receiver. This dealt with the merits of the case, and the validity of the award. The 10th. ground was as to the disqualifications of the arbitrators, and had direct reference to the validity of the award, which is attacked by the petition. The 11th. and 12th. grounds were special demurrers to certain paragraphs of the petition attacking the award. The 13th., 14th. and 15th. grounds attacked the petition generally as a whole and charged the same to be invalid as an attack upon the award which had been rendered.

In passing upon this demurrer the Judge of the Superior Court rendered this decision: (P. R. p. 165).

> "After hearing argument the foregoing demurrer and the amended demurrer of the defendant, E. H. Callaway, Executor of J. B. White, are hereby sustained, and the restraining order heretofore granted is dissolved, and the plaintiff's petition as amended is hereby dismissed. Ordered Further, that this order act as a supersedeas until said case is finally determined. This November 29th. 1920.
>
> HENRY C. HAMMOND
>
> J. S. C. A. C."

This is the decision carried to the Supreme Court by counsel now representing the tax officials, in which they undertook to have said award of the arbitrators set aside, and it was in review of this decision that on March 4th. 1922, the Supreme Court of Georgia rendered its decision by four

judges, affirming this decision of Judge Hammond, two judges expressly approving the award and two judges, Messrs. Hines and Fish, without expressing any disapproval of the award, held that the Act of 1918 repealed the General Tax Arbitration Act of 1910, and that the award was a mere nullity and did not have to be set aside, and that the remedy of the tax officials at law, under the Act of 1918, was adequate and for that reason they joined in affirming the decision of the Superior Court dismissing the equitable petition.

State vs. Callaway, 152 Ga. 871.

Counsel for the State argue that the decision of the Judge of the Superior Court sustaining the demurrers filed by the executor generally to this equitable petition, either was based, or could have been based alone upon the ground that suit ought to have been brought by Steed the Tax Receiver instead of in the name of the State.

Under the facts as stated in the petition demurred to, and the original petition, of which it was supplementary, it distinctly appears that Steed was the County Tax Receiver, and that in making the assessment, he was representing the State, County and Board of Education.

If the bringing of the equitable petition in the name of the State, instead of in the name of Steed, the Tax Receiver, was a defect, the same was curable by amendment.

Georgia Civil Code 1910, Sec. 5690, is as follows:

> "In an action by or against an executor, administrator or other representative, the declaration may be amended by striking out the representative character of such plaintiff, or defendant, and in an action by or against an individual the pleadings may be amended by inserting his representative character."

Under the construction placed upon this section of the Code by the State courts, the name of C. A. Steed, Tax Receiver, suing for the use of the State County and Board of Education, could have been added instanter on motion. If this was a defect and could have been cured on motion, under the law of pleadings in this State it must have been raised by special demurrer at the first term, and could not have been made use of either in a general demurrer or motion to dismiss, made after the first term.

In amendable defects, which are attacked by special demurrers, the court is presumed in complying with the practice set forth in the Code, to hear such demurrers and objections to the pleadings at the first term, and upon intimations of rulings as to the sufficiency of pleadings, the parties have a right to amend to meet such defect.

Frequently the Supreme Court, in affirming a decision sustaining a special demurrer to pleadings for amendable defects, expressly give the right to parties to amend before the remittitur is made the judgment of the lower court.

In the case of Coney vs. Horn, 93 Ga. 724, the 3rd. headnote is as follows:

> The demurrer on the ground that the declaration failed to allege that the defendant was of the county, was sustainable as the omitted allegation was necessary to show jurisdiction over the person. For this defect the judgment dismissing the action is affirmed, but with leave to re-instate if the plaintiff below will amend by supplying this allegation before the remittitur from this court is entered on the minutes in the court below."

Numerous other cases adopting the same practice could be cited from the Georgia courts. But there can be no doubt, under the Georgia decisions that the decision of the Judge of the Superior Court in sustaining this demurrer generally, sustained the general ground of demurrer that the petition set forth no legal or equitable cause of action,

thus passing upon the merits of the case as presented by the petition.

In the case of Bucham vs. Williamson, 131 Ga. 501, the demurrer contanied both general and special grounds, and the trial court, without ruling separately on the special grounds of the demurrer as requested by counsel for the plaintiff, sustained the demurrer and dismissed the petition. The Supreme Court on page 506 recited the following facts and its ruling thereon:

> "A general and special demurrer were not filed separately but all of the grounds were included in a single demurrer. The presiding Judge passed the following order:
>
> "'After hearing the argument on the demurrer filed in this case, it is Ordered by the court that said demurrer be sustained and the plaintiff's petition be dismissed at plaintiff's cost.'"
>
> **"This order should be construed as sustaining the entire demurrer on all the grounds thereof.** Citing Gunn vs. James, 120 Ga. 482."

The court in its decision then criticized the lower court for not complying with the request of counsel for plaintiff by ruling in advance on the special grounds of demurrer so as to give plaintiff an opportunity to amend to meet said grounds.

In the case of Gunn vs. James, 120 Ga. 482, which was a case raising the question of res judicata, the 2nd. and 3rd. headnotes are as follows:

> "2. Where a demurrer to a petition contains several grounds, some going to the merits and some special, and the court sustained the demurrer and dismissed the petition, there is no presumption that the ruling was based upon the special grounds of the demurrer, rather than the general, but the judgment will be treated as sustaining the entire demurrer upon all of its grounds." Citing Merrill vs. Board of Commissioners, 7th. Kans. App. 717; 52 Pac. 109.

"3. Where an equitable petition was filed praying for an injunction and the appointment of a receiver, and at the trial term a general demurrer was sustained and the petition dismissed, and thereafter the plaintiff filed another equitable petition setting up the same cause of action but elaborating the details, and praying besides, the relief sought in the first, other and additional relief, a plea of res judicata filed in bar of the second petition should have been sustained." Citing Smith vs. Hornsby, 70 Ga. 552; Green vs. Ry. Co., 112 Ga. 859.

In the case of Smith vs. Hornsby, 70 Ga. 552, the 3rd. headnote is as follows:

"There has been a former suit embracing the same subject as the present bill, and between the same parties. (The complainant and principal defendant were identical. Other defendants in the present case are privies of those in the former case.) To the first bill a demurrer was filed, **on the ground, among others, that there was no equity therein.** The demurrer was sustained and a judgment taken dismissing the bill on the ground that under the allegations of fact therein contained the complainant was not entitled to the relief prayed for, or any other relief. This decree was brought to the Supreme Court and there affirmed."

"Held, that the former decree was a bar to the second bill and a plea to that effect was properly sustained; that facts properly plead in the second suit were defectively stated in the former bill, furnishes no ground for relief, it not appearing that the complainant was ignorant of these facts when the case was formerly before the court, or that he was prevented from prevailing himself of them by accident or mistake, or by the fraud or act of the adverse party. A court of equity will not grant relief from a judgment that could have been prevented but for the negligence of the party seeking it."

In th case of Green vs. Central of Georgia Railway, 112 Ga. 859, the 1st. headnote is as follows:

"A judgment sustaining a general demurrer to a petition brought to recover damages for negligent destruction of property, will bar a second suit by the same

plaintiff against the same defendant, for the same alleged cause of action, though the grounds of negligence upon which the second petition is based may be different from those embraced in the first."

But counsel for the tax officials, in support of their contention that the sustaining of the demurrer to the equitable petition brought by the State to set aside the award of the arbitrators,, could not be presumed to hold that the petition did not set forth a cause of action, legal or equitable, as contained in the first ground of the demurrer, but the presumption would be that it was placed upon some one of the special grounds of the demurrer, and in support of this contention they cite the case of Steed vs. Savage, 115 Ga. 98, and this case is cited by the United States District Judge in his decision refusing to sustain the plea of res judicata in this case. We respectfully submit that the decision of the court in the Steed-Savage case is not in any sense applicable to the question here raised. In the petition in that case, brought by Steed as Receiver, he set forth the facts which the court held might have made the petition good as a suit in ejectment, or for the recovery of land, but he set forth other facts asking for equitable relief in the nature of a bill for interpleader, and all of the prayers of the petition were for equitable relief, such as is prayed for in a bill or equitable petition for interpleader. Judge Cobb, rendering the decision in that case, stated that there was no prayer in the petition asking for the specific recovery of the property therein described, and that the prayers rather indicated that it was not the intention of the pleader that there should be any recovery by the Receiver of the property until the question had been settled as to whether Roberts, and his associates, or the heirs of Savage, were the owners of the property. The prayer for specific relief was that the parties should interplead. The court, therefore, held that the purpose of the petition was for an interpleader, and not for the recovery of the land, and as the petition did not set forth sufficient facts to entitle plaintiff to an interpleader, they affirmed the court, sustaining the general demurrer to the petition, but stated that such a judgment

would not conclude the parties on the question of title, and would only conclude them on the question that the petition did not authorize the equitable relief prayed for.

Counsel for the tax officials also cited the case of Standard Life Ins. Co. vs. City of Atlanta, 151 Ga. 153, and the same is also cited by the U. S. trial judge in this case, as authority for the proposition that a previous decision in the same case is not conclusive of questions of law raised in the previous case, for the reason that this case was before the Supreme Court previously as reported in 149 Ga. 501, and the recital is made in the last decision that the court did not pass upon the constitutionality of the statute in question in the first case.

The decisions in both of these cases are headnote decisions only, but an actual reading of the headnotes of both decisions will clearly demonstrate that there is no conflict whatever between the doctrine there announced, and that stated in the decisions heretofore cited in this brief, as to the conclusiveness of judgments as to all matters raised, or which might have been raised and put in issue.

In the first case the Standard Life Ins. Co. brought its petition for an injunction against the City of Atlanta to enjoin an assessment for taxes which it claimed had been illegally made against the Standard Life Ins. Co. To this petition the City of Atlanta demurred, and one of the grounds of demurrer undertook to raise the question of the constitutionality of the Tax Statute invoked in the petiion of the Standard Life Ins. Co. The court held that the constitutionality of the statute was not sufficiently raised in the demurrer because no clause of the Constitution was designated as the one violated. Therefore, the court expressly held, four judges participating, Judge Atkinson being absent and Judge Fish dissenting, that the court could not decide the question of the constitutionality of the statute, as it was not raised in accordance wtih the manner in which the rules of court required constitutional questions to be presented. Therefore, it affirmed the grant of

the injunction by the lower court. Judge Fish, in his dissenting opinion, stated that in his opinion the demurrer to the petition did state with specific definiteness, the ground upon which the Statute or Code Section was claimed to be unconstitutional. When the case went back to the lower court for trial, counsel for City of Atlanta, in view of the refusal of the Supreme Court to pass upon the constitutional question which he had attempted to raise on the previous hearing, amended the demurrer of the City of Atlanta so as to designate the clause of the Constitution which it was claimed was violaed by the Statute in question, and the trial court thereupon dissolved the injunction. The Standard Life Insurance Company then brought the case to the Supreme Court, where it is reported in 151 Ga. 153, in a headnote decision.

As the constitutional question was then properly presented by designating the clause which it was claimed the Statute violated, the Supreme Court then expressly passed upon it and held the Statute unconstitutional and violative of the clause of the Constitution designated, and expressly stated that the question of the constitutionality of the Statute was not decided in the former hearing.

It has been held numbers of times, that where a party undertakes to present a question either of law or facts for the decision of the court, and the court refuses to pass upon the question, or refuses to allow an amendment presenting the same, for any reason, the decision is in no such case conclusive of the question which the court, upon request, refused to pass upon.

The best example of such an instance is the case of Draper vs. Medlock, 121 Ga. 234, where, in response to a plea of res judicata, under a former decision, evidence was offered in opposition to the plea showing that in the former litigation the parties then alleged to be estopped by the judgment therein, sought to so amend their pleadings as to have the question in controversy in the subsequent litigation, determined, and that the court disallowed such an amendment,

and this was held admissible evidence. Therefore, we submit the authorities cited do not change the universal rule as set forth in the Code, that previous decisions are conclusive of all matters in issue or which could have been put in issue under the pleadings. We do not contend that if a party tries to put a matter in issue, whether of law or fact, and for any reason he is prevented from doing so by any rulings of the court, whether rightly or wrongly, and whether for defective pleadings or otherwise, that the former judgment would be res judicata.

Therefore, we respectfully submit that the decision of the Judge of the Superior Court sustaining the demurrer to the equitable petition brought to set aside the award, under the pleadings, was an adjudication by the Superior Court of the following general propositions:

1: That the taxpayer was entitled to arbitration under the General Arbitration Act of 1910.

2: That the arbitration board was legally organized.

3: That the award as rendered by the arbitrators, was not void for fraud, accident or mistake, or for any other reason stated in the petition; and,

4: That the award was final and binding both upon the Tax Receiver and upon the taxpayer.

STATE SUPREME COURT DECISIONS

The State excepted to this decision of the Superior Court sustaining the demurrer and dismissing the petition in this case, and carried the case to the Supreme Court of Georgia, and the decision of the Superior Court sustaining the demurrer and dismissing the petition was affirmed. The case was reported in 152 Ga. 871. The decision was by four judges, the two other judges of the Court being absent and not participating.

Two of the judges, Messrs. Hines and Fish, rendered an opinion in the case, holding that the Act of 1918 repealed the Tax Arbitration Act of 1910, and that the arbitration proceedings were null and void, and they concurred in the judgment affirming the lower court sustaining the demurrer to the petition expressly "because the complainants have an adequate, full and complete remedy at law." They then proceeded to state that remedy as follows: "The Tax Collector can issue his executions, based upon the assessments made by the Receiver, and proceed to collect the taxes thereunder."

They further stated that they concurred in the judgment of affirmance solely on the ground that the award was void and that equity would not undertake to set aside a void proceeding which does not stand in the way of the enforcement of the payment of the taxes, based upon these assessments, by executions, levies and sales.

The other two judges participating, Messrs. Beck and Atkinson, each wrote separate opinions expressly approving the arbitration proceedings, the award as rendered by the arbitrators, and stating that the award was not invalid for any reasons stated in the petition, but was final and binding.

It was the opinion expressed by Messrs. Hines and Fish in this case that brought about the issuing of the tax executions by the Tax Collector, for the full amount of the assessments made by Steed the Tax Receiver, on July 28th. 1919.

We have already stated the reason why a re-hearing before a full bench could not be requested in this case. The decision was rendered at six o'clock Saturday night, March 4th. 1922, and the court adjourned that night, and the telegram to the executor announcing the decision stated its affirmance on the main bill of exceptions.

We respectfully submit that this opinion rendered by Messrs. Hines and Fish, did not in any respect modify or change the conclusiveness of the decision of the trial court, the effect of which was to uphold the legality, validity and

binding force of the award rendered by the arbitrators, and in making this contention we do not rely solely upon the fact that these two judges joined in the affirmance of that decision. We do say, however, that the reason given by them for their concurring in the affirmance of the decision, was obiter, and under the rulings of the Supreme Court of Georgia, has no binding effect either in this case or any other case.

UNIFORM PROCEDURE ACT OF 1887

Prior to the Uniform Procedure Act of 1887, courts of equity and courts of common law were distinctly separate in Georgia, and while both equity and common law remedies were enforced by the Superior Courts of the State, equitable proceedings were brought by bill, whereas common law proceedings were brought by petitions or declarations.

The remedies which could be granted in the courts of equity under the allegations of the bill, could properly be classified under two heads:

1: Those which asked permanent and substantial relief such as a bill to set aside or reform a deed or a contract, or to set aside a judgment or an award, or similar relief.

2. Other remedies which could be prayed for, either in the same or a separate bill, were denominated extraordinary equitable relief, such as an injunction, restraining order, receivership ,etc.

The Uniform Procedure Act of 1887, so far as forms of pleading were concerned, abolished bills in equity, and as codified in Georgia Civil Code of 1910, paragraph 5538, is as follows:

> "All suits in the Superior Courts for legal or equitable relief, or both, shall be by petition to the court, signed by the plaintiff, or his counsel, plainly, fully and distinctly setting forth his charge, ground of complaint, and demand, and the names of the persons against whom process is prayed."

The effect of that Act brought about only two results, one was that a plaintiff, whether he was asking for any kind of equitable relief of either class named above, or whether he was asking merely for the enforcement of common law rights, brought his proceeding by petition to the Superior Court, and he was granted the relief which the court decided he was entitled to according to the facts as presented by his petition, and the law applicable thereto. The other result was that while under the prior proceeding, by bill in equity, if it appeared from the bill that the complainant had an adequate remedy at law, either for the permanent, substantial relief he prayed for, or for the extraordinary equitable remedy which he may have prayed for, he was sent out of court and the bill dismissed, provided the defendant in the bill raised the point by demurrer at the first term; whereas, since the passage of the Uniform Procedure Act of 1887, the courts have uniformly held that as to the substantial, permanent equitable relief prayed for in the petition, it is immaterial whether such relief will be characterized as "equitable" relief, or "common law, relief, the plaintiff is in the right forum, and the court will enforce his rights, whether they are equitable or common law rights; and that since the passage of said Uniform Procedure Act of 1887, a plaintiff will not be sent out of court because he has an adequate remedy at law, unless in his petition he prays for some extraordinary equitable relief, such as injunction, restraining order, or receivership, and as to these latter extraordinary equitable remedies, the same rule is now applied to an equitable petition as was formely applied to a bill in equity; but expressly not so where the only relief prayed, is such as cancelling a deed, judgment, award or contract, etc.

As supporting this construction, we cite first authorities rendered in cases arising prior to the Uniform Procedure Act of 1887.

In the case of German-American Ins. Co. vs. Davison, 67 Ga. 11, the court held that where the ground of the demurrer

was that the bill set forth no legal or equitable cause of action, it may not only be covered by a general demurrer, but be raised by motion at the trial term, and where the attack is that the plaintiff has an adequate, complete remedy at law, it must be by special demurrer, filed at the first term.

In Powell vs. Cheshire, 70 Ga. 357, the 2nd. headnote is as follows:

> "A demurrer to a bill in equity, upon the ground that there is an ample common law remedy, must be filed at the first term."
>
> "Where an agreement was made to consider a general demurrer for want of equity, as having been filed at the first term, it not having been in fact so filed, such general demurrer will not be considered as raising the question whether an ample remedy exists at law."

Again in Findley vs. McBurnett, 60 Ga. 627, the court held as follows:

> "Where it is apparent upon the face of a bill in equity that no decree can be rendered in favor of complainants, a motion to dismiss it for want of equity, may be made at the trial term. When the objection is to the forum only, it must be by demurrer at the first term."

In the case of Atkinson vs. Orr, 83 Ga. 37, where it was urged that there was no need for an injunction, as the remedy at law was complete, the court held that the case had been pending for several terms, and the defendants did not demur; treating their motion to dismiss as a general demurrer, this motion came not at the first term, but at the fourth term, and was too late to raise the quesion of a common law remedy. The Supreme Court seemed to think that this was such a plain, clear, principle which it was announcing, that its citation was: "See the Georgia Reports."

The reason for this rule frequently stated by the courts, was that a defendant could not permit a plaintiff to pursue his remedy in a wrong forum, and thus speculate upon the outcome, and when he ascertained that the outcome would

be against him, then raise the question that the plaintiff was in the wrong forum, or was pursuing the wrong remedy. On the contrary, he was required in the beginning of the case, and at the first term, not only to raise the point that the complainant had a plain, adequate, remedy at law, but to point out what the legal remedy was.

As stated above, since the Uniform Procedure Act of 1887 the rule has been modified so far as the ordinary, usual cases, praying for substantial equitable relief, are concerned, and a defendant cannot now send a plaintiff out of court who seeks such relief, upon the ground that he has an adequate remedy at law; but the rule still applies where the plaintiff in his petition prays for an extraordinary, equitable remedy or relief, such as injunction, receiverschip, etc.

One of the first cases construing this Uniform Procedure Act of 1887, was that of DeLacy vs. Hurst, in 83 Georgia 223. In that case it was held that the former rule that courts of equity would not entertain a bill as long as the plaintiff had a common law remedy, and that he must allege and prove that he had sued his claim to judgment, etc., was abolished by the passage of the Uniform Procedure Act of 1887 which confers upon the Superior Courts, jurisdiction to hear and determine all causes of actions, legal or equitable, or both. The 5th. headnote is as follows:

> "But a suit brought under the Act of 1887, or put under it by amendment and demurrer on the ground that complainant had a complete and adequate remedy at law, is not sustainable."

The court, in the case of Reed vs. Wilson, 109 Ga. 424, stated the entire rule in the 2nd. headnote as follows:

> "A demurrer to an equitable petition which prays for no extraordinary relief, upon the ground that there is an ample remedy at law, has not been sustainable since the Uniform Procedure Act of 1887."

Among numerous other cases cited to the same effect, are the following:

Virginia-Carolina Chemical Co. vs. Provident Savings Life Assurance Society, 126 Ga. 50; 1st. h. n.

Harris vs. Lumpkin, 136 Ga. 47;

Maynard vs. Armour Fertilier Works, 138 Ga. 549.

On the contrary, where the special object of the petition is to obtain an injunction, or a receiver, the old equity rule applies and if the question is raised by demurrer at the first term that the plaintiff has an adequate and complete remedy at law, he will not be entitled to the injunction, if the point is sustained.

In Johnson vs. Gilmer, 113 Ga. 1146 the 1st. headnote is as follows:

> "The extraordinary equitable remedy of injunction does not lie in favor of one who has a complete and adequate remedy at law."

But the former rule which applied to bills in equity, namely: that where a defendant desires to raise the point against a petition praying for extraordinary equitable relief, such as injunction, receiver, etc., that plaintiff has an adequate remedy at law he must and can raise the point by special demurrer only at the first term, still applies, and is still enforced by the Georgia Courts since the Act of 1887.

Now in this case there was no demurrer upon the ground that the plaintiff had an adequate and complete remedy at law. The only injunctions prayed for in the case was against the Tax Receiver placing the awards and assessments upon the tax digest, which was useless and nugatory, as the Tax Receiver had already placed them upon the tax digest and against the Tax Collector receiving the taxes calculated by him as due on the awards, and this, in like manner, was useless because he had already refused to accept the tender of such taxes. But under the rules announced above, whether that prevailing prior to the Act of 1887 or that prevailing subsequent to the Act of 1887 be enforced, the point was not in the case that the plaintiff had an adequate remedy at law,

and as no demurrer had been filed upon that ground by the defendant, he could not insist thereon, and the court could not send the plaintiff out of court upon that ground. Certainly since the Act of 1887 the court could not send the plaintiff in that case out of court for the purpose of setting aside the award.

Therefore, we respectfully submit that the reasons given by Judges Fish and Hines for concurring in the affirmance of the court below, was not only obiter, but would directly contravene the established rule of the courts of practice in this State under the Uniform Procedure Act of 1887.

The plaintiff, the State of Georgia, was in the right forum, whether the relief it desired would be called legal or equitable and when the Supreme Court was confronted with a judgment by the trial court, holding the award of the arbitrators legal and binding, if the two judges, Messrs. Hines and Fish differed with that opinion of the trial court, they should either have voted against the affirmance of the lower court, or suggested that the case be sent back for trial, with an amendment invoking the provisions of the Tax Act of 1918. But had they rendered such a decision, or if their opinion concurring in the judgment of affirmance be construed as differing with the dicision of the trial court, still we have only two judges against two judges, out of a court of six judges, where it requires a majority of the six judges to reverse the decision of the court below.

In the case of Forman & Co. vs. Nash, 154 Ga. 483, the headnote is as follows:

> "This case came before this court upon a writ of error from the Superior Court of DeKalb County; and the same being for decision by a full bench of six justices, who are evenly divided in opinion, Fish, C. J., Beck, P. J., and Hill, J., favoring an affirmance, and Atkinson, Gilbert and Hines, J. J. favoring a reversal of the judgment, the judgment of the court below stands affirmed by operation of law."

The identical announcement by the court was made in the following cases:

Supreme Lodge of Masons vs. McClelland, 154 Ga. 580;

Georgia Railway Co. vs. City of Atlanta, 154 Ga. 731;

Bennett vs. Schwarz, 154 Ga. 885.

We therefore insist that the decision of the Superior Court on the petition to set aside the award, in sustaining the general demurrer and dismissing the petition, is final, binding and conclusive, under the decisions of the Georgia Courts, and the United States District Judge trying this case erred in not so holding.

An apt decision announcing the rule followed by the Georgia courts and supported by numerous authorities cited, is that of Hoffman vs. Summerford, 28 Ga. App. 247, where the first two headnotes are as follows:

> "Where the issues presented by the pleadings in a pending suit could have been inquired into and adjudicated in a former suit between the same parties, based upon the same cause of action, either under the pleadings there existing, or as the pleadings could and should have existed by germane and appropriate amendments made thereto, an adjudication of the former suit on its merits, either by demurrer to the petition or otherwise, is res judicata of all issues presented in the suit pending.
>
> "A judgment on demurrer, which passes on the legal sufficiency of the facts stated by the plaintiff to hold the defendant to liability to him, is a judgment on the merits, although the plaintiff has stated only a part of the facts, which he might have stated, and although if the plaintiff had stated the facts fully, fairly and truly as they really existed, he might have set up a transaction showing liability against the defendant."

DOES THE TAX ACT OF 1918 BY IMPLICATION REPEAL THE GENERAL TAX ARBITRATION ACT OF 1910

The General Tax Arbitration Act of 1910 was expressly enacted for the purpose of furnishing to tax defaulters a full, adequate and complete plan for the arbitration of the assessments as made by the Tax Receiver of the County. It is conceded that the Act of 1918 does not expressly repeal the Tax Arbitration Act of 1910. There is no reference whatever made in the Act of 1918 to the Act of 1910. According to the manner in which tax acts have been heretofore construed by the Georgia courts, there has been in the past no intimation that a subsequently passed tax act repealed by implication the Tax Act or provision already in existence, so far as the machinery for assessing and enforcing the collection of taxes are concerned. The universal rulings of the Georgia courts in such cases have been that these acts are cumulative, and exhaustive. It is probably for this reason, and these holdings of the Georgia courts, that counsel did not plead the Tax Act of 1918 as repealing the General Arbitration Act of 1910 in the original proceedings brought in the State court to enjoin the arbitration in this case, and also for the same reason did not plead that Act in support of their equitable petition to set aside the award as rendered by the arbitrators.

In the case of Georgia R. R. vs. Wright, 125 Ga. 608, which was the first case in Georgia making the distinction and declaring the ownership of stocks by Georgia citizens in domestic corporations, non-taxable, and the ownership of stocks by residents or citizens of Georgia in non-resident corportations taxable, and in giving the reasons therefore, Judge Cobb, on page 597, dealing with the apparent conflict between the Tax Acts of 1885 and 1886, used this language:

> "There was no express repeal of the second section of the Act of 1885. Therefore, the provisions of that section have remained in force so far as they were in conflict with the provisions of the Act of 1886."

Again in the case of State vs. W. & A. R. R. Co., 136 Ga. 619, Judge Evans rendering the decision on page 627, held as follows:

> "The General Assembly has enacted an elaborate scheme for the assessment of the property of railroad companies, and the collection of any tax lawfully levied."

Then, after pointing out the remedy in the tax laws of the State, called attention to the fact that the infirmity, as pointed out by the Supreme Court of the United States in Central of Georgia R. R. Co. vs. Wright, 207 U. S. 127, had been cured by the amendment of 1908, referring to the provisions for arbitration in cases of back taxes, which was finally consumated by the passage of the Tax Arbitration Act of 1910. He then refers to the necessity of an assessment for taxes, in the following language:

> "Another insuperable objection to this effort to collect a tax by civil action in the nature of an action of debt, is that there has been no assessment. An assessment is indispensable in proceedings to enforce the collection of taxes. Until an assessment of a per centum tax is made, the amount of the tax is not fixed. The proceedings are in invitum, and to be valid the statute must be followed, and no tax on property can be collected until it has been assessed."

In the case of Vestell vs. Edward, 143 Ga. 368, the Supreme Court of Georgia held that the deficiency in the Tax Equalization Act of 1913, in failing to provide for an umpire in the case of tax arbitrations under that Act, where there was a failure to agree upon an umpire, was provided for by the provisions of the Tax Arbitration Act of 1910.

In the case of Richmond County vs. Steed, 150 Ga. 234, Judge George, delivering the opinion of the court, used this language:

> "Furthermore, the statutory methods provided for the levy, assessment and collection of taxes, and particularly taxes of delinquents, are not merely cumulative; they are exhaustive."

It is our contention that the Legislature did not intend to repeal the Tax Arbitration Act of 1910, so far as it applied to the assessment of property of delinquents, but merely intended to provide an additional remedy, namely: the express permission of the Legislature to appeal to a court of equity because from the very language of the Act, they were adding a species of property to the class of taxable property which no attempt to tax had ever previously been made, namely: where a party had returned his property for grossly less than its market value. Naturally it occurred to the Legislature that in such cases legal questions might arise as to whether, after a party had paid his tax and the same had been accepted by the State or the taxing authorities, the matter could again be opened, and whether or not the assessment as originally entered upon the tax digest of the county, did not have the conclusive force of judgments, and that such questions could be better handled by a court of equity than by a board of arbitrators composed generally of laymen. However this may be, Judge Evans who granted the original temporary restraining order in the present case, was of the opinion that there was a repeal, by implication, of the Tax Arbitration Act of 1910, and that the only remedy left to the taxpayer was to appeal to a court of equity. But after holding this, he goes further and says the courts in this State have never been authorized to assess taxes.

This brings us to the next proposition:

WAS THE ACT OF 1918 VOID AND UNCONSTITUTIONAL AS FAILING TO AFFORD DUE PROCESS OF LAW

While the courts of this country have never attempted to give any accurate definition, in general terms, of what would constitute Due Process of Law, or what would not constittue Due Process of Law, they have made so many applications of the principle that courts are not now left entirely in the dark as to what constitutes Due Process. From numerous applications of the principle, one thing is certain,

neither Congress nor the Legislatures of the various States can, at will, provide a restricted character of hearing which does not afford the party interested, full opportunity to present and have enforced, all of his legal and equitable rights, and by the law-making powers' own declarations make that Due Process of Law.

Again, as the Due Process clause is made applicable to all branches of the Government, even if the decisions of its courts, where a party's legal or equitable rights are denied, or by the acts of its administrative officers, where a party's rights are in like manner denied, have been repeatedly declared to be violative of the Due Process Clause of the Constitution.

In Murray's Lessees vs. Hoboken Land Co., 18 Howard 272, Mr. Justice Curtis says:

> "The words "Due Process of Law" were undoubtedly intended to convey the same meaning as the words "by the law of the land" in Magna Charter."

It was therefore held by the court in that case as follows:

> "The article is a restraint on the legislative, as well as on the executive and judicial powers of the Government, and cannot be construed as to leave Congress free to make any process, 'due process of law' by its mere will."

In Zeigler vs. R. R. Co., 58 Ala. 599, the Supreme Court of that State says:

> "Due Process of Law implies the right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty or property in its most comprehensive sense, to be heard by testimony or otherwise, and to have the right of controversy by proving every material fact which bears on the question of right involved in the matter."

Mr. Webster in his argument in the Dartmouth College case, said that the law of the land was substantially equiva-

lent to Due Process of Law, and defined the former as follows:

> "By the 'Law of the Land' is meant 'the General Law' which hears before it condemns; which proceeds upon inquiry and renders judgment only on trial."

In adopting Mr. Webster's definition, the Supreme Court of Missouri in Clark vs. Mitchell, 64 Mo. 578, says it is entirely correct in assuming that a legislative enactment is not necessarily the law of the land. The words "by the law of the land" as used in the Constitution do not mean a statute passed for the purpose of working a wrong. That construction would render the restriction absolutely nugatory, and turn this part of the Constitution into mere nonsense.

Mr. Justice Miller, in Davison vs. New Orleans, 96 U. S. 104, in discussing the meaning of these words, says:

> "It is probably better to leave the meaning to be evolved by the gradual process of judicial inclusion and exclusion, as the case presented for decision shall require, with the reasoning on which such decisions may be found."

In the same case, Mr. Justice Bradley adds these words:

> "In judging what is 'due process of law', respect must be had to the cause and object of the taking, whether under the taxing power, power of Eminent Domain, or the power of assessment for local improvements, or none of these; and, if found to be suitable or admissibe in the special case, it will be adjudged to be 'due process of law'; but if found to be arbitrary oppressive and unjust, it may be declared to be not' due process of law.'

In this same case, on page 105, Mr. Justice Miller stated the same proposition conversely as follows:

> "But however this may be, or under whatever other clause of the Federal Constitution we may review the case, it is not possible to hold that a party has, without 'due process of law', been deprived of his property when, as regards the issues affecting it, he has, by the

laws of the State, a fair trial in a court of justice, according to the mode of proceeding applicable to such case."

In Chicago, Burlington & Quincy R. R. Co. vs. Chicago, 166 U. S. 226, the 3rd. syllabus is as follows:

"The contention that the defendant has been deprived of property without 'Due process of law' is not entirely met by the suggestion that he had due notice of the proceedings for condemnation, appeared and was admitted to make defense. The judicial authorities of a state may keep within the letter of the statute prescribing forms of procedure in courts, and give the parties interested the fullest opportunity to be heard, and yet it might be that its action would be inconsistent with that amendment."

This was an appeal from the Supreme Court of Illinois in which case the appellant had had a full hearing, and the Supreme Court had finally passed on the case; but appellant's property had, nevertheless, been taken by the judicial procdure in that State without adequate compensation therefor having been paid.

In the body of the decision, at the bottom of page 234, the court used this language:

"But a state may not, by any of its agencies, disregard the prohibitions of the Fourteenth Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in courts, and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. **In determining what is 'due process of law', regard must be had to substance, not to form.**"

The court, on page 235, quotes from Davidson vs. New Orleans, 96 U. S. 104, as follows:

"Can a State make anything 'due process of law' which, by its own legisation, it chooses to declare such? To affirm this is to hold that the prohibition to the States is of no avail, or has no application where the

invasion of private rights is affected under the forms of state legislation."

In the case of Hagar vs. Reclamation Dist. No. 108, 111, U. S. p. 708, the court held as follows:

> "It is sufficient to observe here, that by 'due process' is meant one which, following the forms of law, is appropriate to the case and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by law. It must be adapted to the end to be attained; and wherever it is necessary, for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought."

In the case of Railroad Tax cases, reported in 13th. Fed. 722, where the decision of the Circuit Court was rendered by Mr. Justice Field, on page 751, Due Process is defined as follows:

> "And by 'due process' is meant one which, following the form of law, is appropriate to the case and just to the parties to be affected. **It must be pursued in the ordinary mode prescribed by the law;** it must be adapted to the end to be attained, and it must give to the party to be affected, an opportunity of being heard respecting the justice of the judgment sought. Without these conditions entering into the proceeding, it would be anything but 'due process.'

The case of Turner vs. Wade, 254 U. S. 64, is the last Georgia Tax case passed upon by the Supreme Court of the United States. This was an appeal from the Supreme Court of Georgia having under review a tax arbitration proceeding under the State Tax Equalization Law of 1913, and came from Brooks County, where the three arbitrators were selected as provided in the Act, but no two of them could agree upon the same amount, and therefore they did not make an award within ten days, as required by the Act, and notwithstanding the fact that the valuation placed upon the property by each of the arbitrators was less than that assessed, the Supreme Court of Georgia held that under the law the assessment was binding, and this court, upon re-

view, held that such decision and construction of said Tax Act deprived the taxpayer of due process of law.

Assuming, then, for the sake of argument, that District Judge Evans was correct when he says that the Tax Act of 1918 by implication repeals the Tax Arbitration Act of 1910, and that U. S. Dist. Judge Barrett, who rendered the decision now under review, was correct in following the decision of Judge Evans on this question, the question then presented, is whether the Act of 1918 gives to the taxpayer who is required under the terms of said Act to make returns of his property to the County Tax Receiver, due process of law where the taxpayer claims that the assessment is excessive.

In the same decision, Judge Evans, in granting the interlocutory injunction, immediately following the above recited holdings, holds as follows:

> "This Act of 1918 does not provide for a re-assessment in the event the valuation is found to be excessive by the court, because courts are without power to make an assessment of taxes, the same not being a judicial function."

Under the heading that "The Tax Act of 1918 did not Furnish an Adequate Remedy at Law," we have already cited the Georgia Section of the Code prohibiting the interference by courts with the assessment, levy and collection of taxes (Civil Code Sec. 1163), and cited the following cases construing and applying that law in Georgia:

State vs. W. & A. Ry. Co., 136 Ga. 619

Norris vs. Coley, 100 Ga. 551;

Bohler vs. Verdery, 92 Ga. 718;

DuBignon vs. Brunswick, 106 Ga. 324.

These decisions are very persuasive of the correctness of Judge Evans' holding, in granting the interlocutory injunction, that courts are without power to make an assessment of taxes, the same not being a judicial function.

The question of taxation, being strictly a legislative function in Georgia, it must be conceded that the Legislature could legally and constitutionally empower a court of equity, or any other court, as well as administrative officer, to make assessments of property for purposes of taxation, provided in such enactment, a plan adequate to the purpose is prescribed and furnishd by the Act. But it is respectfully submitted that in a State where all of the assessments of property for taxation are prescribed by statutes, which are strictly construed and are administered by the administrative officers under these statutes, and where the courts are prohibited from in any manner enlarging, modifying or interfering with such administration, to take from the taxpayer every right to be heard or to have any hearing of any kind except to appeal to a court of equity in the State where the property is located, without at the same time authorizing the court of equity to assess the property, after a hearing, and without clothing such court of equity with any plan of procedure, or prescribing any rules of evidence, or in any manner stating what elements arising in the case could be considered by such court, is not 'due process of law.'

As a matter of fact, had the right to appeal to a State Court of Equity not been given, and the assessment as made by the receiver had been final, the taxpayer could still have appealed to a court of equity in Georgia, as well as to a United States Court of Equity, if the other jurisdictional facts appeared.

But the question is, "Does this bare right to appeal to a State court of equity furnished a remedy that is appropriate to the case, and just to the parties to be affected; and it is adapted to the end to be attained, namely: the assessment of property for purposes of taxation?"

Suppose that the taxpayer is forced into a court of equity under the Act of 1918, as his only remedy, where the assessment has been made without any notice or opportunity to him to be heard. As this is a tax act, a strict construction

will be placed upon the word "excessive" and apparently all that he could show, would be that the assessment was "excessive" and it is probable that the courts would hold that he would be limited to showing that it was in excess of the full, legal value of the property taxed, or sought to be taxed, and the court would probably hold that it would make no difference that the great mass of property in the State of Georgia was taxed at a mere nominal percentage of its true value. It would probably also be held that the taxpayer, under the Act of 1918, could not raise that question and literally following the language of the Act, he would certainly not get his rights, or equal and impartial protection of the laws, nor would he have opportunity to be heard thereon. Under such strict construction of a tax statute, the taxpayer would not get his rights under the uniform tax provision of the State Constitution, nor woud he have an opportunity to be heard thereon.

Assuming, then, that the judgment of the court of equity to which he is permitted to appeal, exercising the restricted powers conferred upon it, enjoined only the excess of the assessment over and above the full market value of the property, could it be said that the taxpayer was afforded 'due process of law'? Take the great outstanding element in this case of willful and intentional discrimination against the estate of White in the matter of enforcing the collection of back taxes. Could a Court of Equity, under this restricted Tax Statute, deal with that question, and would it not properly hold that it was not authorized by the Tax Act in question to deal with any question except whether the assessment was excessive, that is, exceeding the full market value of the securities in question?

It is seriously questioned whether, under a strict construction of the Tax Act of 1918, the tax receiver in this case had any right to make the assessment under that Act. According to Sec. 5, he only has the right to make the assessment for back taxes under this Act "where the taxpayer refuses or fails to return such property after notice given him."

In this case the taxpayer made a return, (P. R. p. 88-89), and it cannot be truthfully said that he refused or failed to return such property after notice given him. If this is a true construction of the Act, then the proceeding in this case is not under that Act, but is under the Uniform Tax Arbitration Statute of 1910, as it appeared on its fact to be, and as it professed to be.

Therefore, we respectfuly insist that one of the two propositions is the only logical conclusion, namely: that the Tax Act of 1918 did not apply in this case, and the award of the arbitrators is final, binding and conclusive; or, if the Tax Act of 1918 did repeal the Tax Arbitration Act of 1910, it was void for want of 'due process of law.'

The case of Wadley Southern R. R. vs. Georgia, 235 U. S. 651, is cited to the effect that the U. S. Courts will not construe State statutes until they have been construed by the State courts.

We respectfully insist that the case cited does not hold any such proposition, and that such is not the rule.

In this case, Mr. Justice Lamar delivering the opinion, stated that from an examination of the section of the Code under review it was quite clear that it recognized the right to a judicial review of administrative orders, and until it had been given a contrary construction by the State court, it must be construed by the Supreme Court of the United States in such a way as to leave it valid, and as conferring that kind of a right which furnishes an adequate and available remedy which meets the requirements of the Constitution, and that any other construction would not only impute to the Legislature the intention to deny the equal protection of the law, but permit the carrier to be deprived of its rights without due process of law, and would be to nullify the penalty section as a whole. The decision in this case in no manner conflicts with that of Michigan Central Ry. Co. vs. Powers 201 U. S. 245, where the court held as follows:

> "A State statute may be unconstitutional because conflicting with the Constitution of the State, or with that of the United States, but all objections to its validity, whether State or Federal, may be presented in a single suit and call for consideration and determination; and as a Federal court has jurisdiction, it may be its duty, when the question is properly presented, to pass upon an alleged conflict between a State statute and the State Constitution, even before the question has been considered by the State tribunals. It will, however, be reluctant to do so, especially where the Statute is one affecting the public revenues of the State."

The case of Illinois Central R. R. vs. Kentucky, 218 U. S. 551, cited by counsel for the tax officials, is not applicable here. In that case it appears that the complaining taxpayer had ample opportunity to be heard. On page 561 it is stated that the Board made the assessment in the way that all other assessments were made, and gave notice to the railroad company as required by the statute, and if any injustice was done, it was due entirely to the failure of the complainant in that case to appear before the board and ask a reduction of the assessment.

In like manner in the case of Hibben vs. Smith, 191 U. S. 310 cited by counsel for the tax officials, an opportunity was given the taxpayer to be heard before the body making the assessment. The same is true as to the facts in the case of Milwaukee vs. Keoffler, 116 U. S. 292.

We desire also to cite the following authorities in support of the proposition that a Federal Court of Equity has authority to enjoin the enforcement of tax fi fa which would constitute a cloud upon the title to personal property.

In the case of Thompson vs. Emmett Irrigation Dist. 227 Fed. Rep. 564, by three Judges of the Circuit Court for the 9th. Circuit, Circuit Judge Morrow delivering the opinion of the court, in the beginning of his decision held as follows:

> "For the present purposes, the allegations of the bill must be taken as true. They state a case for the re-

moval of a cloud upon the personal proprty. It has been held that such a case is within the jurisdiction of a court of equity."

Citing a large number of cases, among others, that of Louisville & Nashville Ry. Co. vs. Western Union Telegraph Co., 234 U. S. 370., where the syllabus as rendered by the court is as follows:

> "Sec. 57 of the Judicial Code makes suits to remove any encumbrance, lien or cloud upon the title to real or personal property, cognizable by the District Courts of the District in which the property is situated, regardless of residence of the parties, and process for service of the non-resident defendants by notification outside of the district, or by publication."

EXCEPTIONS TO THE RULING OF THE COURT ON INTEREST

The trial court in this case made the following ruling against the estate of White as to interest on the amount tendered to the Tax Collector on September 5th. 1919, and paid to the Tax Collector on September 25th. 1922: (P. R. p. 199).

> "However, the taxes owing should have been paid without condition. The amount tendered on September 5th. 1919 was $27,980.88 and was upon condition that it was 'in full payment of the above taxes and interest as calculated upon the assessments rendered by the Board of Arbitration on Sptember 2nd. 1919'. On September 25th. 1922 the same amount was paid by the Executor of the Estate of White, unconditionally.
>
> "Under the view here expressed, I am of the opinion that there must be paid interest on such amount, $27,-980.88 for the period from September 5th. 1919, to September 25th. 1922, and so hold."

Two exceptions were made to the court's decree, in this ruling: First, in holding that the estate of White was liable for this interest at all; and, second, that as the amount of $27,980.88 as calculated by the Tax Collector on the awards

rendered by the arbitrators, included the interest for each year on the taxes up to that date, the ruling necessarily required the estate of White to pay interest on interest, or compound interest, which is in violation of the Georgia law on the subject of interest.

We will deal first with the question as to whether the tender was a legal tender.

The tender, as made, was put in writing, signed by the Tax Collector and the Executor, and that instrument is in evidence. (P. R. p. 210). The undisputed evidence is that the Tax Collector made the calculation of taxes on the assessment as fixed by the award, for each year, and then calculated, in addition thereto, the interest on the taxes for each year and added the two together, obtaining the amount of taxes for all of the seven years, and the interest thereon to September 5th. 1919, making an aggregate amount of $27,980.88, all as based upon the awards made by the arbitrators, and that the Tax Collector then called off his figures to the Executor of White who wrote them down, including the summary and aggregate amount of principal and interest, and the tender was then made in these words:

> "My check as Executor of J. B. White, on The Planters Loan & Savings Bank for $27,980.88, tendered to Chas. S. Bohler, Tax Collector, Richmond County, Georgia, on September 5th. 1919, in full payment of the above taxes and interest as calculated upon the assessments rendered by the Board of Arbitration on September 2nd. 1919."

Apparently exception is made by the court to the statement therein that it was "in full."

The language cannot be construed as meaning in full payment of all taxes for said years due by the estate of White. Its evident and clear meaning was that it was in full payment of the taxes as calculated by the Tax Collector upon the assessments as made by the Board of Arbitrators. It had to be for the full amount of the taxes due on that award.

If it had said "in full payment of all taxes due by the estate of White for said years" the criticism would be valid. But when it was confined to the figures as calculated by the Tax Collector on the award, it was a legal tender of said taxes, and the interest thereon to that date.

During the hearing of this case before the trial court on September 25th. 1922, when some question was raised as to whether the tender had been made in good faith, and an intimation given that the Tax Collector would receive the Executor's check in payment of the taxes, the check was again tendered for the same amount and the receipt as executed by the Tax Collector to the Executor, after stating the same calculation as that made by the Tax Collector on September 5th. 1919, was as follows: (P .R. p. 185).

> "Received from E. H. Callaway, Executor of the estate of J. B. White, $27,980.88 in payment of the back taxes due to the State County and Board of Education of Richmond County by the estate of J. B. White, for the years from 1911 to 1917 inclusive, including interest calculated thereon up to September 5th. 1919, said calculation of taxes and interest being based upon the award of the arbitrators in said tax proceedings as rendered by the board of arbitrators therein on September 2nd. 1919, in accordance with a statement thereof as set forth above."

It is respectfully insisted that in substance and meaning there is no difference between this receipt and the tender as made on September 5th. 1919. Both were for identically the same amount. Both referred to the calculations as made by the Tax Collector on the awards of the arbitrators. The fact that one said "in full of those amounts as so calculated upon said awards," and the other said "in payment of the amount as calculated on said awards" meant, in common parlance and language, the same thing. We therefore respectfully submit that if the tender was sufficient to be received by the Tax Collector on September 25th. 1922, it was equally sufficient to have been accepted by him on September 5th. 1919. In both instances the tender was in payment of the

taxes, including interest to September 5th. 1919, as calculated and based upon the awards as returned by the arbitrators. It is respectfully insisted that in each instance the tender was an unconditional tender in payment of the particular taxes referred to therein.

One of the requirements of tender, as fixed by Georgia Code Section 4322, is as follows:

> "A tender, properly made, may be equivalent to performance. If in money, the coin need not be actually presented unless demanded; it must be certain and unconditional except for a receipt in full or delivery of the obligation, and may be made by an agent or friend, and to an agent authorized to receive. It must be in full of the specific debt, and not in part, and may be made at any time before final trial, and if sustained, no subsequent cost shall be paid by the defendant; if rejected, and not on any ground of informality, such informality cannot be afterward urged in objection to the tender."

We respectfully insist that under these requirements it had to be in full of the amount of taxes as calculated upon the assessments by the arbitrators, in order to comply with this Code Section.

In neither the original tender nor in the final tender which was accepted and receipted for, was there any attempt to pay any taxes other than those including the interest calculated and based upon the award of the arbitrators, and it was certainly intended in each instance to be in full of such taxes.

The point is not made that the Executor tendered his check instead of the actual cash, as that was expressly waived in writing by the Tax Collector, the only officer authorized to receive the taxes, and to whom the tender could be made, and it was a similar check which the Tax Collector finally accepted from the Executor on September 25th. 1922.

The effect of tender of taxes due under the award after September 5th. 1919, is controlled by the case of Georgia R.

R. vs. Wright, 125 Ga. 610, where Judge Cobb, speaking for the Court, used this language:

> "If a taxpayer tenders the amount of taxes due from him before an execution is actually issued, no interest on the tax can be lawfully required of him."

Again at the top of page 613 in the same case, the court used this language:

> "There seems to be a general rule that when a party is restrained by injunction from paying over funds in his hand to the person entitled thereto, he will not be chargeable with interest while so restrained. Wherever a person has funds in his hands belonging to another party, and is willing to pay them over, or where a person owes a debt and is willing to pay it, and the person having the funds or owing the debt is restrained by an injunction, and there is no way in which the money can be paid into court so as to relieve him, it would be equitable and just that during the pendency of the proceeding, which he had no part in instituting, he should be relieved from interest on the debt."

The court was there dealing with the question of interest on taxes which the taxpayer had been restrained from paying. It will be recalled inthis case that after the tender made on September 5th. 1919, in the equitable petition brought in the name of the State to set aside the award and for injunction against the Tax Collector receiving the taxes as prayed for, the court granted the restraining order, and when the general demurrer to that petition was sustained, and the court dissolved the restraining order, in the same order a supersedeas was granted until the final determination of the case, and that immediately after the decision of the court in that case was affirmed on March 4th. 1922, the Executor of White again made the same tender to Bohler, the Tax Collector, which again was declined and followed by the issuing of the executions sought to be set aside in this case.

The latest announcement of the Legislature of Georgia on the subject of interest on taxes, is the Act approved Au-

gust 20th. 1917, Public Acts 1917 page 197, the 1st. section of which is as follows:

> "That from and after the passage of this Act all taxes due the State, or any county thereof, remaining unpaid on December 20th. in each year, shall bear interest at the rate of 7% per annum from said date, and the several tax collectors of this State are required to collect the interest on such unpaid taxes, and account for the same in their final settlements."

Section 2 of the Act merely relates to reports by Tax Collectors to the Comptroller General.

Section 3 is as follows:

> "That from and after the passage of this Act the several Tax Collectors of this State shall keep a record showing the amount of interest collected from the delinquent or defaulting taxpayer, the date upon which said taxes and interest was collected, and from whom collected."

The other sections of the Act are not relevant.

INTEREST ON INTEREST

But the court not only required the Executor to pay interest on the taxes found to be due under the award, up to September 5th. 1919, but on the entire aggregate amount of principal and interest, namely: on $27,980.88. Of this amount it will be seen by examining the calculation made by the Tax Collector when the first tender was made $21,950. represented the aggregate amount of taxes due for each of the seven years up to that date, and that the balance of the amount tendered to-wit: $6,030.88 was the interest on the taxes for said seven years. Therefore the court's ruling required the Executor to pay for the two years, interest not only upon the aggregate amount of the taxes due for said years, but interest on the interest which had already been included therein.

Under Georgia law this is held to be compound interest and illegal.

We will cite only one authority,—a decision by the Supreme Court of Georgia, in Wofford vs. Wiley, 72 Ga. 870, where the court held as follows:

> "The law does not favor interest upon interest, except in special cases of fiduciary trust, or something of that sort; in cases where it is contracted for at higher rates than 7%, the contract must plainly show the liability."

We respectfully insist that under none of the Acts of the Legislature of Georgia have Tax Collectors ever been authorized to collect compound interest, or interest on interest. Prior to the passage of the Act of 1917, quoted above, the law on the subject in Georgia was the Act of 1889, codified in Georgia Civil Code 1910, Sec. 1144, which is as follows:

> "All executions issued for taxes due the State or any county thereof, or any municipal corporation therein, whether issued on assessments for permanent improvements of streets or sewers of said municipal corporation, or otherwise, shall bear interest at the rate of 7% per annum from the time fixed by law for issuing the same: Provided, that this section shall not apply to taxes or tax fi fas issued by any municipal corporation imposing penalties for failure to pay taxes.'

The very language of both the above recited Statutes on the subject of interest on taxes positively negative the idea of assessing or requiring the taxpayer to pay compound interest.

For the reasons above stated it is respectfully submitted that this portion of the ruling of the court in the trial of this case on the subject of interest, should be reversed.

For the reasons herein presented, we respectfully submit that the motions of the appellants in the main appeal, should not be granted, and that on the contrary, the court should affirm the case on the main appeal and reverse the court on

the cross-appeal, and that the case is of sufficient importance not to be placed upon any summary docket. The executor of White has no objection to the court advancing the hearing of the case if it sees proper to do so.

Respectfully submitted,

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